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PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
Plaintiff-Appellee,)
) CIRCUIT COURT,
vs.)
) COOK COUNTY.
JOHN WERNER,)
Defendant-Appellant.) HON. DAVID CERDA,
Presiding.



132 I.A. 1

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the crime of battery and was placed on probation for one year, the first ten days to be served in the House of Correction. On this appeal he contends that he was not proven guilty beyond a reasonable doubt and that the trial court improperly allowed the complaining witness to make an in-court identification of the defendant and "to corroborate his own testimony."

ARST

On May 30, 1968, at approximately 5:00 P.M., Constantine Galotta arrived at his place of employment, a drive-in restaurant, in Chicago. He observed six to eight automobiles parked in the parking area of the drive-in, with about 25 persons, including defendant, drinking and sitting on and around the automobiles. Galotta testified that the people he observed were not customers in the drive-in and that he asked them to leave the area.

The group refused to disperse, and, instead, one of the men in the group began beating Galotta. Within minutes Galotta was being beaten by six men, one of whom was striking him in the back with a baseball bat. Galotta testified that he was knocked to the ground by the men while the rest of the group looked on. The witness stated that defendant was one of the six men beating him, and that defendant was using his fists. The evidence indicates that Galotta was conscious throughout the entire incident.

Employees of the drive-in noted the automobile license plate number of the vehicle being driven by the defendant. Acting on the information so provided, Galotta and a police officer called at the defendant's home a few days after the incident, but the defendant was not home. They called again the following day and defendant was placed under arrest.

For the defense, the defendant, his father, his godfather and his sister testified that between the hours of 9:00 A.M. and 7:00 P.M., on the day in question, the defendant was helping to move the sister's household belongings from one area of the city to another, several miles from the drive-in. Defendant's father also testified that the automobile which the defendant was allegedly driving on the day in question was registered in the father's name. Another of the defendant's sisters and the defendant's girlfriend testified that they were at the drive-in on the day in question in the defendant's automobile, with the defendant's girlfriend driving, that they were ordered out of the drive-in by Galotta, and that they later returned to the drive-in at which time the vehicle's license number was noted by the drive-in employees. Both latter witnesses testified that defendant was not with them at the drive-in that day.

Defendant contends that the in-court identification of the defendant was tainted by the face-to-face confrontation at the defendant's home several days after the incident.

It should be noted that this matter is raised for the first time on this appeal. No attempt was made below to test the question by means of a pre-trial motion to suppress, nor were any objections at the time the testimony was offered. (See *People v. Harris*, 33 Ill. 2d 389.)

Nevertheless, the record clearly shows that the complaining witness' in-court identification of the defendant had an origin independent of the face-to-face confrontation. It is undisputed

that the complaining witness and the defendant knew each other by sight prior to the incident; defendant himself admitted as much at trial. It is also clear that Galotta had ample opportunity to observe his assailants, Galotta testifying specifically that defendant struck him with his fists and that defendant was not the person who struck him with the baseball bat. See *People v. Nelson*, 40 Ill. 2d 146; *People v. Robinson*, 42 Ill. 2d 371. Under the circumstances of this case, the authorities cited by defendant are not applicable. (See *United States v. Wade*, 388 U.S. 218; *Gilbert v. California*, 388 U.S. 263; *Stovall v. Denno*, 388 U.S. 293.) The admission of the in-court identification of the defendant was proper.

Defendant also contends that the evidence does not prove his guilt beyond a reasonable doubt. We disagree.

As detailed above, the record shows that the testimony of the complaining witness Galotta was positive and clear and that it went unshaken on cross-examination. The testimony of one witness, where that testimony is positive and the witness credible, is sufficient to sustain a conviction, although that testimony is contradicted by the accused. *People v. Nickelson*, 105 Ill. App. 2d 138.

The credibility of witnesses is a matter for determination by the trier of fact, and it has been consistently held that the trier of fact is not obliged to believe alibi testimony presented by the defense. *People v. Holt*, 124 Ill. App. 2d 198.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

MC CORMICK, P.J., and LYONS, J., concur.

70-60

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ARST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On JANUARY 29, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Abstract

IN THE
APPELLATE COURT OF ILLINOIS

FILED

1971

SECOND JUDICIAL DISTRICT

HOWARD K. KELLEY, Clerk
Appellate Court, 2d District

THE PEOPLE OF THE STATE OF
ILLINOIS,

Plaintiff-Appellee,

vs.

O. C. HORTON, (Impleaded),

Defendant-Appellant.

)
)
)
)
) Appeal from the Circuit
) Court of Winnebago
) County, Illinois.
)
)
)

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The appellant, O. C. Horton, was jointly indicted with Robert Snulligan, James Jackson and Fred Ivey for the offense of armed robbery. Snulligan and Horton were tried together before a jury that returned a verdict of guilty against both defendants. The trial court denied Horton's petition for probation and sentenced him to a term of not less than two nor more than ten years in the penitentiary. Snulligan received a sentence of two to three years to run concurrently with a similar sentence imposed in Cook County for another conviction. Jackson and Ivey pled guilty to the charge. On appeal, Horton contends that the trial court erred in not granting his motion for a directed verdict at the close of the State's

evidence and in the imposition of the sentence.

Marshall Stowe testified that he was employed as an attendant in a filling station located in Rockford on April 20, 1969. At approximately 6:15 A.M. on that day Stowe was in the station with the manager, Robert Adams, when two men entered. One man walked by Stowe and stood behind him. The other pulled a gun and said "This is a stick up." The two men took Stowe's money changer, wallet and some cash from the register and, after forcing Stowe and Adams into a storeroom, left. Stowe was unable to identify the men other than to say they were black and wore plaid and black leather jackets respectively. The testimony of Adams was similar to that of Stowe except that he identified Snulligan as one of the two men that robbed the station. Neither Stowe or Adams saw the two assailants leave the station, the direction they took, or any automobiles that might have been used by them.

Richard Bast and David Henrekin, police officers of the City of Rockford, testified that they were on routine patrol duty in the area of the filling station at approximately 6:25 A.M. on April 20 when they observed a Cadillac convertible race by them at a high rate of speed. The officers turned on their sirens, flashers and red lights and pursued the Cadillac for several blocks until it was forced to stop at the end of a dead-end street. The officers then saw four negroes get out of the car and scatter in different directions. One of the four, later identified as Horton, wore a purple suit and left the car from the driver's seat. The two officers left their squad car and apprehended Ivey and Snulligan a short distance away. When they returned to the squad, they

learned of the robbery at the filling station from a radio dispatch and advised headquarters that they believed they had two of the suspects and requested help.

Officer Michael Schild arrived at the scene in response to Bast's call for help. He and his partner left the car and walked along a railroad embankment for about a block. Schild came upon Horton and Jackson on the other side of the embankment and advised them to halt. Both men attempted to flee but Horton fell to his knees after Schild fired a warning shot into the air. Schild searched Horton and found only \$.40 in the pocket of his purple suit. The police did find a changer and wallet on the ground in the area of the Cadillac that were identified by Stowe as the items taken from him at the station.

In essence, this was the only evidence offered by the prosecution against Horton in their caseⁱⁿ chief. After his motion for a directed verdict was denied, Horton elected to testify in his own defense. Horton testified that he had lived in Rockford for about 2-1/2 years but had moved to Michigan approximately one year before April 20. On April 19, Horton met Jackson and Ivey in Detroit and the three of them agreed to drive to Rockford in Jackson's Cadillac to visit some of Horton's relatives and friends. On their way, they picked up Snulligan, a friend of Horton but previously unknown to Jackson or Ivey, in Chicago. The four arrived in Rockford where Horton directed Jackson off the tollway near the filling station. Since it was only 6:00 A.M., Horton said they agreed to stop the car and sleep before they visited

his cousin. Jackson parked the car around a corner from the station and then, for the first time, asked Horton to come with him to rob it. Horton refused to go and Jackson called him a "chicken". Jackson and Ivey then left the car and Horton laid down in the front seat to get some sleep. About fifteen minutes later, Jackson and Ivey returned to the car and Jackson told Horton to drive away. After they had gone about a half a block, Jackson informed Horton that he had robbed the station and, in panic, Horton increased his speed. Horton soon noticed a police car in pursuit and after an unsuccessful effort to out distance them was forced to stop at the dead end street. Horton further testified that there had been no discussion of a robbery prior to immediately before Jackson and Ivey left the car and that he was unaware that Jackson had a gun. Ivey, who testified as a witness for Snulligan, said that he and Jackson went into the service station and that Jackson held it up.

It has been clear since the case of *The People v. Washington*, (23 Ill. 2d 546, 548) decided by the Supreme Court in 1962 that the law in Illinois is that a defendant waives his right to a directed verdict at the close of the case for the prosecution if he elects to testify after the motion is denied. *The People v.* 90;
Cross, 40 Ill. 2d 85, / *People v. Aarhus*, 111 Ill. App. 2d 167, 176;
85;
People v. Merrill, 76 Ill. App. 2d 82, / *People v. Lacey*, 49 Ill. 305.
App. 2d 301, / This rule was most recently repeated by our Supreme Court in the Cross case when it succinctly stated, p. 90:

"The defendant's next contention may be shortly disposed of. He claims that the trial court erred in denying defendant's motion for directed verdict made at the close of the People's case. This motion was waived when the defendant introduced evidence after the motion had been denied. (citation omitted)."

The defendant cannot, of course, ignore that this clearly is the law in this state at the present time but urges that it should be changed because of its fundamental unfairness and, as authority, cites the United States Supreme Court case of Harrison v. U. S., 392 U.S. 219. In the Harrison case, the only evidence against the accused were three confessions admitted over objection. After his motion for a directed verdict was denied, the defendant testified in his own defense. On appeal it was determined that the confessions were inadmissible and that their introduction into the trial was an abridgement of the right of the defendant to a fair trial. The Supreme Court held that, as a consequence, the defendant had, in effect, been compelled to testify by the improper admission of the confessions and reversed his judgment of conviction.

The defendant would have us extend the logic of the Harrison case to the facts before us. The State failed, it is contended, to present sufficient evidence to take the case to the jury. When the trial court, erroneously, denied his motion for a directed verdict, he was compelled to testify to protect himself. That the jury apparently placed little credence in his testimony that he was, in effect, an unwilling participant in a crime of impulse is of no significance since he should not have been forced to testify at all.

Although the argument is not without some interest, it fails because of the weakness of the first premise. It was not necessary for the State to offer proof that Horton actually entered the station filling/since he could be held accountable for the conduct of his

companions under Section 5-2 of the Criminal Code if he "(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense..." (Ill. Rev. Stats, 1969, Ch. 38 sec 5-2); People v. Ramirez, 93 Ill. App. 2d 404,^{410.}/ The evidence for the State showed Horton emerged from the driver's seat of a car stopped only after a high speed chase a few blocks from the scene of a robbery shortly after the crime had occurred. He is apprehended as he attempts to flee only after a warning shot is fired. Another occupant of the car is identified as one of the robbers and the fruits of the robbery are found scattered in an area immediately around the car. Clearly, it would have been improper to direct the jury to return a verdict of not guilty with these facts before it.

It is next argued that the disparity in the sentences imposed on Horton and Snulligan was not warranted. The penalty for armed robbery is imprisonment for "...any indeterminate term with a minimum of not less than two (2) years." (Ill. Rev. Stats, 1969, ch. 38, sec. 18-2 (b)).

The authority of a court of review to reduce sentences should be exercised with caution since "...the trial judge ordinarily has a superior opportunity in the course of the trial and the hearing in aggravation and mitigation to make a sound determination concerning the punishment to be imposed..." The People v. Taylor,^{66.} 33 Ill. 2d 417, 424; People v. Bush, 95 Ill. App. 2d 57,/ The

only witness to appear at his hearing was Horton himself and he testified as to a past record of a purse snatching when he was a juvenile and a petty theft in 1966. There is nothing in the record as to the background of Snulligan but there was evidence that his role in the robbery was a passive one. Horton, Ivey and Snulligan all testified that Snulligan was "high" when he was picked up in Chicago and that he was asleep in the car during most of the trip to Rockford. Although one of the witnesses for the State identified Snulligan as one of the men in the filling station, all the other testimony was that he was asleep in the car at the time the robbery occurred. The police officers testified that he was helped from the car by Ivey after it was stopped and that he was "woozy" when they captured him. Horton, on the other hand, drove the car from the scene and was the only one of the four familiar with Rockford. Although the record does not indicate the reason for the disparity in the maximum sentences imposed by the trial court, it is entirely possible that he was influenced to some extent by the comparative involvement of the two defendants in the commission of the crime. There is nothing raised by Horton to show that his sentence was the result of bias, prejudice or abuse of discretion. Accordingly, we will not interfere with the sentence imposed by the trial court. 218; People v. Fortson, 110 Ill. App. 2d 206, / People v. Hobbs, 56 Ill. App. 2d 93, 99.

The judgment of the trial court is affirmed.

AFFIRMED.

SEIDENFELD AND GUILD, J. J. Concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present - - Honorable THOMAS J. MORAN, Presiding Justice

Honorable MEL ABRAHAMSON, Justice

Honorable GLENN K. SEIDENFELD, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

MARCH 3, 1971 the Opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

ILA M. BROWNING,)	
)	
Plaintiff-Appellee,)	
)	
vs.	)	Appeal from the Circuit Court
	)	of the 17th Judicial Circuit,
	)	Winnebago County, Illinois.
GORDON T. JOHNSON,)	
)	
Defendant-Appellant.)	

JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

Defendant claims that improper conduct of plaintiff's counsel was prejudicial and deprived him of a fair trial. The appeal is from a judgment entered upon a jury verdict of \$30,000 in an action for damages arising from an automobile collision which occurred on April 28th, 1968.

Although defendant does not charge that the judgment is excessive, a brief statement of the evidence relating to liability and damages is necessary to place the claim of prejudice in proper perspective.

The accident occurred when the defendant came over the crest of a hill and started to pass a car going in the same direction. In pulling around this car, defendant struck the car in which plaintiff was a passenger, which car was being driven in the opposite direction. There was evidence of evasive action by the drivers, and the impact occurred on the shoulder on plaintiff's side of the road.

The plaintiff was 25 years old. It was undisputed that as a result of the accident she incurred a fracture of the humerus of the left arm, facial and body lacerations, a fracture of her jaw bone, and temporary radial nerve palsy on the left side of her face. Open-reduction surgery was performed on the arm and the fracture was held in place by a 4 inch by $\frac{1}{2}$ inch metal plate; the jaw bone was fixed with a metal strip and rubber band brace. Plaintiff was in the hospital approximately 8 days and was seen as an outpatient by the treating physician for the next 6 weeks. During that time, X-rays were taken which showed a good position for the fracture but very little healing.

Plaintiff testified she had stiffness in the elbow and physiotherapy was prescribed; that she stayed in bed most of the 8 week period following her discharge from the hospital; that her left shoulder was in a sling and she had to sleep sitting up for about 4 months; and that she wore the jaw braces for 6 weeks during which time she could not open her mouth. She testified to pain following the injury. She testified that at the time of trial she still had difficulty chewing; that she bites her tongue; that she doesn't speak distinctly and sometimes "sprays people" when she talks; that her two front teeth were capped; that on occasion she gets earaches and headaches; and that her arm is still weak and hurts.

The doctor who examined plaintiff some 5 months prior to trial and again a few days prior to the trial testified to the following: the extension of plaintiff's left elbow is 155 degrees compared to 180 degrees for a normal elbow. There is a $\frac{3}{16}$ th of an inch wide scar on the front surface of her arm with visible stitches, and there is another one and a half inch scar about a quarter of an inch wide on her body. Measurements of the left arm compared to the right arm led to the conclusion that there was some atrophy in the left arm. There was more than normal loss of

strength in the left hand. When the plaintiff tried to open her mouth, the width was not as great as normal. There was some loss of sensation of touch. There was less movement in the left elbow just prior to trial than at the previous examination. The doctor concluded that the conditions described were permanent. He found that the fracture was healed in good position.

The doctor who had examined plaintiff on behalf of the defendant testified that there was no limitation of motion in regard to the movement of the arm and only a 15 degree loss of extension of the left elbow. He found no loss of hand grip nor abnormality of the jaw but did find some unevenness in her dental bite. He found no evidence of atrophy, concluding that the one-half inch difference in circumference did not necessarily mean atrophy related to her injury. He found no evidence of pain during the examination.

There was evidence of some \$1,800 in medical and dental expenses. At the time of the accident, plaintiff had been employed as a hand packer for the Amerock Corporation, earning \$80.00 per week. She had not returned to work at the time of trial.

Defendant first argues that during the direct and cross-examination of witnesses, especially during the cross-examination of the defendant's medical witness, plaintiff's counsel made improper and prejudicial remarks which he persisted in despite admonishment by the court. We have examined the record, and it appears that this alleged misconduct consisted of plaintiff's counsel's interruption of witnesses before they had finished their answers, and that counsel, in fact, recognized this and apologized for it on several occasions. However, all of the witnesses did finish their answers so that no prejudice occurred as a result of the interruptions.

The further contention that the closing argument was prejudicial and deprived defendant of a fair trial is illustrated by references to the record which defendant urges constitute abuse of the defendant, unwarranted characterizations of counsel, and attacks upon defendant's medical witness. Plaintiff's counsel characterized defendant as "piggish" and "selfish", a "road-hog", as wanting both lanes and the shoulder as well, "regardless x x x whether he would injure somebody or destroy their property". He told the jury that plaintiff had been injured through no fault of her own but as a result of defendant's failure to drive as a reasonable person "and not like a maniac, not like a speed demon, not like a hot-rodder". He argued that defendant drove "blindly", "in a hurry, a big operator, a big deal". He urged that the jury not be sympathetic to defendant (who appeared in court in a wheel chair as the result of an accident in an airplane which he had piloted subsequent to this accident) because defendant had driven like a "maniac" and a "hot-rodder".

Plaintiff's counsel, referring to closing argument by defense counsel relative to the failure of plaintiff to use seat belts, argued that from the damage to the car that plaintiff would have died if she had not been thrown out of the car. Then he stated, "they seem to be very disappointed, apparently, that someone didn't die here x x x"; and stated "what ingratitude". Plaintiff's counsel accused defense counsel of trying to "brainwash you" when defense counsel argued that the plaintiff's arms "were even". Plaintiff's counsel referred to plaintiff's demonstration before the jury in which "it was obvious" that they were different.

In referring to the testimony of defendant's medical witness, plaintiff's counsel said "this arm is half-an-inch different", and asked if there were no professional ethics when the doctor said it didn't mean anything. He argued that the doctor had a mission and

was going to "make it good for the defendant, regardless of ethics, regardless of professional responsibility and professional conscience". He suggested it was not "decent", not "respectable" for the doctor to conclude that there was only a minimal displacement when he didn't measure it. He argued that he supposed the doctor "hated himself in the morning when he left this witness stand for having put out such a bunch of garbage and rubbish and misleading untruthful and unprofessional comments on someone's injuries". (Defendant's counsel in his closing argument also insinuated a lack of professional responsibility in plaintiff's medical expert, although in more subtle and refined terms. He stated that the plaintiff's doctor was "anxious to testify for the plaintiff", and "so anxious" that in answer to a question, the "response was canned". While saying that he was not going to say anything unkind about the doctor, he suggested to the jury that they had met different kinds of professional people and from their experience could get an idea of how quick they were to respond and whether they were partial and came for a particular purpose.)

Plaintiff's counsel asked the jury, in their assessment of damages, to "put your feet in this lady's shoes, and also in Mr. Johnson's for that matter", and to consider "what you would expect to receive from the chair Mrs. Browning sits in if you were there under the same or similar conditions, under the same facts you have heard here".

Not a single objection was made at trial to plaintiff's counsel's argument. The general rule is that assignments of error, based upon alleged improper argument to the jury, are waived unless objection has been made and preserved in the trial court. The rule is based upon a recognition that the trial court is in a better position than the reviewing court to observe the

demeanor of counsel and the general atmosphere of the trial and thus in better position to determine the prejudicial effect, if any, of the remarks. The discretion of the trial judge is considerable, and it is presumed to be properly exercised. However, the rule of waiver does not apply where the argument of counsel is so inflammatory and prejudicial as to deteriorate the judicial process. Belfield v. Coop, 8 Ill. 2d 293, 312, 313 (1956); McElroy v. Force, 38 Ill. 2d 528, 535 (1967); Bruske v. Arnold, 44 Ill. 2d 132, 137 (1969); Paulsen v. Gateway Transp. Co., Inc., 114 Ill. App. 2d 241, 247 (1969); Enloe v. Kirkwood, 120 Ill. App. 2d 117, 123 (1970). Nevertheless, the ultimate question on review is not whether a trial was scrupulously free from error, but whether the error prejudiced the aggrieved party or unduly affected the outcome of the trial. Bruske v. Arnold, supra, at page 139; Ziegler v. Smith, 86 Ill. App. 2d 215, 224 (1967).

Defendant relies principally upon the holding of this court in Paulsen v. Gateway Transp. Co., Inc., 114 Ill. App. 2d 241, supra, in which we reversed for improper argument by the same counsel, although no objections had been made. However, in Paulsen the statements were clearly attacks upon defense counsel with no application to any issue in the case, and our view of the whole record led to the conclusion that the jury was, in fact, prejudiced by the argument.

We have reviewed the entire argument with the record in this case. The argument, for the most part, was a commentary on facts and could be said to have had an evidentiary basis in the record, although the characterizations used were exaggerated, abrasive, and inappropriate. Requesting the jury to put themselves in plaintiff's position was, of course, not a commentary on the evidence and was also clearly improper. Similarly the reference to defendant's tactics and lack of feeling were improper. The reference made by plaintiff's counsel to defendant's doctors was also improper.



But it is this kind of error which may be waived by failure to object when the evidence is not greatly conflicting and the case is not close on the facts.

In this case the liability was clear. There was evidence that defendant, in view of the car in which plaintiff was riding, pulled out to pass, pulled back and then pulled out again. The faulty judgment of defendant driver was evident. There has been no claim of error in the instructions; and the defendant does not charge that the verdict is excessive. We cannot say that the improper argument unduly affected the outcome below; therefore, we do not believe that the rule of waiver by failing to object should be here suspended.

Defendant has also claimed reversible error in the statement made by plaintiff's counsel in closing argument to the effect that the jury should "let us worry" about collecting the judgment "no matter how great it is", concluding "that is our problem not your problem because you are not going to have to pay it out of your own pocket". Defendant argues that the remarks "insinuated that defendant had insurance". We do not so construe the remarks nor consider them a ground for reversal. See Rasmussen v. Clark, 346 Ill. App. 181, 198 (1952).

We will not interfere with the exercise of discretion by the trial court in denying the motion for a new trial. The judgment below is affirmed.

AFFIRMED.

MORAN, P.J. and ABRAHAMSON, J. concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
March 29, 1971 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit
) Court of the Nineteenth
 Plaintiff-Appellee,) Judicial Circuit, McHenry
) County, Illinois.
 vs.)
)
 IGNATIUS B. FAULISI,) Honorable
) Charles S. Parker,
 Defendant-Appellant.) Judge Presiding

RECEIVED
 1971
 HOWARD K. KRAMER,
 Appellate Court, 2d Div.

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

The defendant was arrested on November 19, 1969, after an indictment had been returned charging him with the offense of unlawful possession of explosives. On March 23, 1970, when represented by two attorneys of his own choice, the defendant withdrew his plea of not guilty, entered a plea of guilty, and was sentenced to a term of two to five years in the Illinois State Penitentiary. Thereafter, defendant filed a pro se motion for a new trial, claiming he was improperly represented by counsel. On May 11, 1970, he was denied permission to withdraw that motion, and the motion was denied.

The trial judge appointed Morton Zwick, Executive Director of the Illinois Defender Project, as counsel for defendant on appeal. On September 14, 1970, Zwick filed a motion to withdraw as counsel in this court pursuant to Anders v. California, 386 U.S. 738, stating that after a careful examination of the case he has concluded an appeal would be unsuccessful, time consuming and wholly frivolous. He supported his motion by a brief. Copies of the motion and brief were mailed to the defendant at the Joliet Penitentiary on September 18, 1970. By a letter of the same date, this court, through its clerk, advised the defendant that on the court's own motion the matter had been continued

until October 16, 1970, in order to allow the defendant to file any additional matters he feels may be meritorious in his behalf, or other matters as to why the motion should not be allowed, and the court after proper review of the record affirm the judgment against him. The motion to withdraw and brief in support thereof by Zwick are properly submitted. ^{The} People v. Jones, 38 Ill. 2d 384.

The defendant did not file a pro se brief and argument thereafter, but the first two issues presented by Zwick in his brief, in support of his petition for leave to withdraw, are stated to be presented at the request of the defendant. These issues are whether the defendant was denied his right to a speedy trial and whether the defendant's retained attorneys were incompetent. Two other issues are raised by Zwick. They are whether the court sufficiently admonished the defendant as to his constitutional rights as well as the consequences of his plea and possible sentence; and whether the plea of guilty was understandingly made.

The defendant contends that his right to a speedy trial was violated because he was not tried within 120 days of the date of his arrest and, therefore, he was entitled to a discharge pursuant to Chapter 38, Section 103-5(a), Ill. Rev. Stat. (1969). The record reveals that although the defendant was in custody from November 19, 1969, until sentencing on March 23, 1970, (a period in excess of 120 days), at the request of counsel of his choice he was granted a continuance on January 9, 1970. This continuance, being occasioned by the defendant, tolled the running of the 120-day period, and the statute was not violated. (People v. Jenkins, 101 Ill. App. 2d 414.) Furthermore, the failure to make a motion for discharge and the pleading of guilty

constituted a waiver of the defendant's right under the 120-day
The statute. People v. DeCola, 15 Ill. 2d 527; People v. Milani,
The 34 Ill. 2d 524.

Our examination of the record reveals that defendant's two retained counsel did everything possible in the best interests of their client, and that the defendant's claim that they were incompetent is entirely without merit.

The record also reveals on our independent examination that the court fully admonished the defendant of his right to a trial by jury, the nature of the charges and the possible sentence which could be imposed. It appears that not only did the court advise the defendant of all of his constitutional rights, but his attorneys also had advised him of his rights. They also engaged in an extensive pre-trial conference with the State's attorney before the defendant moved the court to change his plea from not guilty to guilty.

We have determined also that the plea of guilty was understandingly made as the court extensively examined the defendant as to whether the guilty plea was entered knowingly and voluntarily. The responses of the defendant as to the consequences of his change of plea were made after he had conferred with both of his counsel and was made aware of the position of the State's attorney resulting from a conference which his attorneys had with the State's attorney prior to the change of plea. There is no factual basis in the record to support the defendant's contention that the plea was not made willingly, knowingly and understandingly.

As required by Anders v. California, supra, we have examined the entire record and are of the opinion that the appeal lacks merit, and if pursued further, would be frivolous. Therefore,

appellate counsel is given leave to withdraw and the judgment of the Circuit Court of McHenry County is affirmed.

JUDGMENT AFFIRMED.

SEIDENFELD and GUILD, J. J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

April 6, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

FILED

APR 6 - 1971

HOWARD K. KELLETT, Clerk
Appellate Court, 2nd District

FORT DODGE TRANSPORTATION CO.,)

Plaintiff-Appellant,)

vs.)

Appeal from the Circuit

Court of the Fifteenth

Judicial Circuit, Stephen-

ROY STONE TRANSFER COMPANY,)

son County, Illinois.

Defendant-Appellee.)

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This action was brought to recover damages to a bus owned by Fort Dodge Transportation Co. allegedly caused by the negligence of the driver of a truck owned and operated by the Roy Stone Transfer Company. At the close of the plaintiff's case, the court granted the defendant's motion for a directed verdict and judgment was entered on the verdict. The plaintiff's motion for a new trial was denied and this appeal followed.

On March 8, 1968, at approximately 10:45 A.M., Melvin Cook was driving the bus in an easterly direction on Route 20 in Stephenson County, Illinois. The bus had left Fort Dodge, Iowa at 1:45 A.M. that morning and was bound for a church convention in Chicago with 34 passengers aboard. Route 20 was about 18-20

feet wide with white lines down the middle and along the edges.
It was an overcast day with some mist and the road was wet.

When the bus was about 15 miles west of Stockton, it came behind the defendant's truck also proceeding east on Route 20. The bus followed the truck for approximately 10 miles but was unable to pass it because of the many curves in the road. When they were about 5 miles west of Stockton the road straightened out and the bus attempted to pass. A collision occurred between the two vehicles that damaged the bus but no one was hurt.

The complaint alleged that the defendant was negligent in that it "... (a) Failed to have the vehicle under control. (b) Failed to maintain a proper lookout. (c) Drove at a high and dangerous rate of speed under the circumstances then and there existing. (d) Failed to drive its vehicle on the right half of the roadway contrary to Chapter 95-1/2, Section 151 of the Illinois Revised Statutes. and (e) Otherwise negligently, carelessly and improperly operated said vehicle."

The only occurrence witness to testify was the driver of the bus, Melvin Cook. He said that the bus was in its proper lane and going about 35-40 miles an hour when he started to pass. He was asked what happened next and replied:

"Well, I turned my signals and went over to the left lane and I was on the white line on the edge of the pavement and as I got along side of it, the back end of the truck hit the bus, so I pulled over in the right lane and the truck pulled over in the right lane and we stopped."

He also stated "As I got along side, the back end of the trailer jumped over..... I don't know if there was something on the road

or what but the back end of the trailer came over and that is what caused the damage to the bus." On cross examination, Cook testified that he did not know if the front of the truck changed direction at any time because he was looking in his mirrors at the time he started to pass. He was then asked:

"Q. Your testimony here is that the rear of the semi-trailer truck jumped in front of the bus?

A. Well, I couldn't tell. I was watching behind and I was trying to keep track of everything."

The only other witness to testify was the mechanic who repaired the bus.

It is agreed by the parties, that the guidelines in regard to directed verdicts are contained in the leading case of Pedrick vs. Peoria and Eastern Railroad Company (37 Ill. 2d 494) where the Supreme Court, after a comprehensive examination of the cases to date, stated the rule as follows, p. 510:

"In our judgment verdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

The plaintiff contends that if the trial court had properly applied this rule to the facts of this case, it could not have directed the jury to return a verdict in favor of the defendant. They argue that the evidence showed that the bus was as far to the left as it could go ("...on the white line on the edge of the pavement..") as it started to pass when the truck "jumped" or "came over" and struck the front of the bus. From this evidence,

the plaintiff maintains, the jury could reasonably infer that the truck was in the wrong lane at the time of the collision (in violation of Section 151 of the Motor Vehicle Code) and that it was in the wrong lane because of the failure of the driver to keep it within proper control.

There is a thread of logic to these contentions urged by the plaintiff. The jury could infer, from Cook's testimony, that the truck was in the wrong lane at the time of the collision and they could further infer from that inference that the truck was not under proper control. We are of the opinion, however, that such evidence is altogether too fragmentary and insubstantial to take the case to the jury. The Supreme Court also stated in the Pedrick case a salutary and realistic explication of the general rule, pp, 504, 505:

"But the presence of some evidence of a fact which, when viewed alone may seem substantial, does not always, when viewed in the context of all of the evidence, retain such significance. As the light from a lighted candle in a dark room seems substantial but disappears when the lights are turned on, so may weak evidence fade when the proof is viewed as a whole. Constitutional guarantees are not impaired by direction of a verdict despite the presence of some slight evidence to the contrary (Chamberlain; Blume, 'Origin and Development of the Directed Verdict,' 48 Mich. L. Rev. 555, 576-7), for the right to a jury trial includes the right to a jury verdict only if there are factual disputes of some substance."

We believe, that the evidence in this case, even when viewed in its aspect most favorable to the plaintiff, so overwhelmingly favors the defendant that no contrary verdict could ever stand. Daly v. Bant, 122 Ill. App. 2d 233, 242.

/1
As a consequence, the judgment of the trial court should be affirmed.

AFFIRMED.

SEIDENFELD & GUILD, J. J. Concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ARST

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
March 30, 1971 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
Second Judicial District

FILED

APR 30 1971

HOWARD K. KUBERT, CLERK
APPELLATE COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit
)	Court of the 18th Judi-
Plaintiff-Appellee,)	cial Circuit, DuPage
)	County, Illinois.
vs.)	
)	
THOMAS GLUGLA,	Honorable
)	William J. Bauer,
Defendant-Appellant.)	Judge Presiding.

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

The defendant, Thomas Glugla, was indicted in DuPage County for the crime of indecent liberties with two children. After a bench trial, he was convicted of the lesser included offense of contributing to the sexual delinquency of a child and placed on probation for two years.

The sole issue presented by the defendant in this appeal is whether he was proved guilty beyond a reasonable doubt of the crime of contributing to the sexual delinquency of a child. On August 18, 1969, defendant resided with his wife in a home next to the Patterson residence in Villa Park. A swimming pool had been constructed in the backyard of the Patterson residence entirely above ground level, with sidings of redwood and a fibre glass liner, and contained about four feet of water. The defendant had made repairs to the pool prior to this date, and at about 2:00 p.m. on August 18, 1969, went into the pool and began making repairs to the filter element. Debbie Patterson, one of the prosecution witnesses, who was eight years' old at the time, testified that while she and some friends were

swimming around the pool, the defendant told her to help him with the filter he was fixing. He asked her to hold the screws, but instead, made her hold his privates through his swimsuit. She further testified that this went on for two or three minutes, and although she tried to swim away from him, he kept pulling her back. Finally, he let go of her, and when she got to the ladder, he held her back again and stuck his hand down the back of her pants. He finally let her go again and she left the pool. About one-half hour later she told her mother of the incident. Mrs. Patterson testified that her daughter talked to her about the incident with the defendant; that the Patterson family went with the Glugla's to a lake the next afternoon, but she did not mention the incident to either Mr. or Mrs. Glugla. Mrs. Patterson further testified that she did not do anything after her daughter discussed the incident with her because she was more or less in a state of shock.

Claire Tellone, the other girl involved in the charges against the defendant, was nine years' old and lived in the neighborhood. She testified that she went to the Patterson pool on August 18, 1969, and that the defendant also came over to the pool; that he put his arms around her and held her while she was in the water; that after he put his arms around her he put his hands in the bottom of her swimsuit. The defendant did not let her go and told her to be quiet. She freed herself later. A short while after that, while she had a clear view of the defendant and Debbie Patterson in the pool, she saw him hold Debbie's arm and make her hold his privates through his swimsuit, and did not let her go but she did get away from him soon thereafter. ~~Ask xxxxxxx~~ She went home and told her mother ~~about~~ what happened.

in the swimming pool. Mrs. Tellone testified that she had a conversation with her daughter about 2:30 p.m. of that day about the incidents in the swimming pool, and told her husband, who is a deputy sheriff for DuPage County. Thereafter, that same day, Mrs. Tellone went to the police station, as did her husband later, and told of the incidents. Mrs. Tellone did not know the defendant at the time, although she knew his wife. The police did not arrest or place charges against the defendant until two weeks later.

The defendant's wife, testifying for the defendant, stated that she had been married to him for nineteen years; that they lived next to the Pattersons for seven years, and that she was in her backyard with the brother and sister-in-law when her husband was in the pool, about 25 or 30 feet away, fixing the filter. She saw Debbie Patterson in the water with him, but because the pool was above ground from where she was sitting, she could only see her husband's face and arms. Sometimes her husband was out of view when he was in the pool, as was Debbie Patterson. She said the defendant was in the pool for ten minutes and that she walked over to the swimming pool while he was in the water fixing an object that was floating in the water, but that she was only there a minute or so.

The defendant testified that he had helped Mr. Patterson assemble the pool, and that at about 2:00 p.m. on the date in question he went to the pool to fix the filter; that Debbie Patterson was in the water with him and nobody else, and that his wife, brother-in-law and sister-in-law were about 25 feet from him. He stated he was in the water between 5 and 10 minutes, fixing the element, and that Debbie Patterson was in the water

and next to him/helping him by holding the screwdriver. He further testified that at no time did he cause or force Debbie Patterson to touch his privates and that at no time did she touch any part of his body. He also testified that at no time did he put his hands in the swimsuit of Claire Tellone. He stated he first learned about the complaint on August 25, 1969, when he received a call from the police station.

The defendant contends he was not proven guilty beyond a reasonable doubt because of the improbable testimony of the complaining witnesses, the surrounding circumstances, the manner in which the alleged offense was committed, the physical presence of defendant's wife and others during the alleged commission of the offense, and also the reaction of the mother of one of the complainants on the day of the occurrence and the succeeding day. Thus, it is said that the testimony of the two girls involved is not substantially corroborated or clear and convincing.

If the testimony of the complaining witness of a crime, such as is alleged, is uncorroborated and is not of the clear and convincing quality necessary, there is a reasonable doubt as to the defendant's guilt. (People v. Bryant, 123 Ill. 39, App. 2d 35, 259 NE 2d 638). The courts have always safeguarded the interests of the accused where the testimony, particularly of a child of tender years, is uncorroborated, by making certain that said testimony is clear and convincing, and have not hesitated to reverse such a conviction if that condition is not met. (The People v. Walker, 13 Ill. 2d 334; People v. Williams, 414 Ill. 414.) In Williams, it was held that the testimony in itself of a young boy was sufficient to sustain

a verdict of guilty, where it was clear and convincing, although the corroborating evidence required in order to sustain a conviction is not as to the actual taking of indecent liberties.

reading of

A/the testimony of both girls involved reveals that each of their testimonies was clear and convincing, and unshaken by cross-examination. Debbie Patterson's testimony was also corroborated by the eyewitness testimony of Claire Tellone. Both of the girls promptly complained of their acts to their mothers. The testimony of Mrs. Glugla is not of much help to the defendant, because from where she was sitting in her backyard, there were times when she could not see Debbie Patterson in the pool, and at times she could not see either the defendant or Debbie Patterson in the pool. She did not have an unobstructed view of the defendant as contended, and when she went to the pool she was only there for several minutes. However, Claire Tellone directly observed the incident. The surrounding evidence and circumstances as testified to by the two girls were corroborated, except in minor detail, by the testimony of the defendant and his wife. The only controversy is as to the occurrence itself. There is nothing coherently improbable in the testimony of the girls, and no reason has been suggested to indicate any motive on the part of the girls to lie. The defendant places emphasis on the fact that neither girl made an outcry. It could have been that they did not comprehend what suddenly occurred. It is also noted that Claire Tellone testified that the defendant told her to keep quiet, and force was used as to each of the girls. However, the girls did promptly complain to their mothers, and although Mrs. Patterson did not promptly complain to the police, Mr. and Mrs. Tellone did. It was said in People v. King,

"... It is understandable that a mother might not know what to do and would be reluctant to call the police and involve her 13 year old daughter in a case of this nature."

As the Pattersons and Gluglas had been friends for a few years, it is entirely probable that this friendship, the incident and the shock testified to, resulted in the Pattersons not promptly reporting the occurrence to the police, as well as the fear of involving their daughter in this type of case. As a jury had been waived, the credibility of the witnesses and the weight to be given their testimony was a matter for the trial judge. The evidence of both complaining witnesses was credible, clear and corroborated, even though contradicted by the accused.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

SEIDENFELD and GUILD, J.J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On

March 29, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

11-29-1971

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
vs.	)	the 16th Judicial
	)	Circuit, Kane
GEORGE SVOBODA,	)	County, Illinois
)	
Defendant-Appellant.)	

PRESIDING JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

Defendant appeals a one to five year sentence imposed upon his plea of guilty to a charge of burglary, contending: that the trial court considered inadmissible evidence in denying his application for probation and; that the trial court erred in incarcerating him, while granting probation to the other defendants, when all three had similar records.

At the time of the burglary, defendant, and one of his co-defendants, were eighteen years of age; the third boy was seventeen. All three applied for probation. The court conducted a probation hearing in which the boys and their parents testified. In reaching his decision, the trial judge considered probation reports which contained a description of the crime, a list of admitted offenses, and a summary of each boy's background, and additionally considered letters from parents, employers, and others.

Defendant first contends that the trial court was in error when, in passing on his application for probation, it considered the probation report's reference to three juvenile convictions. His argument is based on Section 702-9 (1) of the Juvenile Court Act, (Ill. Rev. Stat. 1969, Ch. 37, Sec. 702-9 (1)), which prohibits the use of an adjudication under the Act, for any purpose whatever, in a subsequent criminal proceeding concerning the minor.

The burden of presenting mitigating circumstances in a record falls upon a defendant and it is he who must make a substantial showing in order to justify a reduction of sentence on review. The People v. Nelson, 41 Ill. 2d 364, 367 (1968). The report does not describe the type of juvenile proceedings which were conducted, and defendant has not made the record of juvenile proceedings a part of this record. Paragraph 2 of Section 702-9 (2) (Ill. Rev. Stat. 1969, Ch. 37, Sec. 702-9 (2)) states an exception to the rule relied upon by defendant and permits the consideration of proceedings, under the Juvenile Court Act, where a defendant, who has been adjudicated to be a delinquent minor under the Act, is later convicted of a crime and applies for probation. Defendant has not excluded the possibility that the items in the probation report were delinquency proceedings, admissible under Section 702-9 (2) and, therefore, has not met his burden of presenting a sufficient record on review to sustain his contention.

Defendant next claims that, since there was no great variance in the prior records of the boys, the trial court erred in incarcerating him while granting probation for the other two.

It is the duty of the court to prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders. (Ill. Rev. Stat. 1969, Ch. 38, Sec. 1-2 (c).) The law does not necessarily contemplate that the same penalty will be inflicted upon all persons who are guilty of the same offense; different sentences for persons who are guilty of the same offense may not constitute disparate treatment of the offenders. People v. Loyd,

125 Ill. App. 2d 196, 200 (1970). However, when there is an abuse of discretion, the reviewing court may reduce the sentence imposed (Ill. Rev. Stat. 1969, Ch. 110 A, Sec. 615 (4)) if, from the record, "it clearly appears that the penalty constitutes a great departure from the fundamental law and its spirit and purpose, or that the penalty is manifestly in excess of the proscription of section 11 of article II of the Illinois constitution..." The People v. Taylor, 33 Ill. 2d 417, 424 (1965); The People v. Hampton, 44 Ill. 2d 41, 48 (1969).

The record discloses that one boy had a substantially different background from the defendant. The remaining co-defendant was seventeen, single and unemployed. He had eight arrests (one of which involved a 78 day jail term). While he had substantial family problems, his parents seemed to exhibit a genuine willingness to help. People other than family members expressed some hope for his rehabilitation. The chief probation officer and the State's Attorney recommended that he be granted probation. On the other hand, the defendant was eighteen years old, married with one child, separated from his family and living with his parents. He was unemployed and apparently made no effort to support himself or his family. He admitted eleven different offenses or arrests. He also had a background of family problems but there is little in the record to imply that any effort at change in the family relationship would be made. One letter in the record expressed absolutely no hope for him. The chief probation officer recommended that he be denied probation.

Finally, the record discloses that the trial court reduced the claimed disparity by giving defendant credit for 48 days which he had spent in jail prior to the hearing.

We have made a careful examination of the record to ascertain whether this is a proper case for reduction of sentence, (People v. Nelson, supra, at p. 368). Considering the facts in the light of the trial judge's opportunity to observe the demeanor of the witnesses, we hold that there was adequate basis for the disparity in sentencing.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED

Seidenfeld and Guild, J.J. - Concur

132 I.A. 241

70-186
UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On April 23, 1971, the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
Second Judicial District

FILED

JAN 21 1971

HOWARD K. KILSTY, Clerk
Second Judicial District

BARBARA G. HILL,	)	Appeal from the Circuit
	)	Court of the 18th Judi-
Plaintiff-Appellant,	)	cial Circuit, DuPage
	)	County, Illinois.
vs.)	
)	
RONALD I. MARSHALL and)	
MANGINI & ASSOCIATES, INC.,	)	Honorable
	)	Bruce R. Fawell,
Defendants-Appellees.)	)	Magistrate Presiding.

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

This action was commenced by the plaintiff, Barbara G. Hill, in the Circuit Court of DuPage County, seeking damages for injuries sustained when her automobile was "rear ended" by a vehicle driven by defendant, Ronald I. Marshall, an employee of the other defendant, Mangini & Associates, Inc., owner of the vehicle. At the trial and after all the evidence was submitted, plaintiff moved for a directed verdict on the issue of liability. Plaintiff's motion was denied. The jury returned a verdict for the defendants, and judgment was entered accordingly. Plaintiff has duly perfected her appeal to this court.

The facts in this case are substantially as follows. Both plaintiff and defendant Marshall were in the center lane of three lanes of traffic proceeding westerly on Roosevelt Road, with the plaintiff directly in front of the defendant, Marshall. They had stopped for a red light at the intersection of Butterfield and Roosevelt Roads in DuPage County. When the light

turned green, the lanes of automobiles proceeded westerly. At some distance west of the intersection, the westbound lanes of travel merged from three lanes into two lanes. A car from the northerlymost and non-continuing lane cut in front of a car which was in front of plaintiff's car. This caused the car in front of the plaintiff to come to a sudden stop.

Plaintiff testified that she was at least a car length behind the car in front of her when it was cut off. When the brakes of the vehicle in front were applied, plaintiff likewise made a sudden stop, four feet behind the car in front. Plaintiff did not know how fast she was traveling when the vehicle in front made its sudden stop, but she applied her brakes immediately when she saw the brake lights go on. The driver in front of plaintiff did not have time to give a hand signal, nor did plaintiff give one. At just that moment, plaintiff saw the defendant in her rearview mirror and noticed that he was approaching quite rapidly. Plaintiff testified the defendant covered four or five car lengths before hitting the rear of her car. Plaintiff was unable to estimate the defendant's speed in miles per hour. Seconds before the collision, plaintiff also noticed in her rearview mirror that defendant was looking into the faster lane of traffic. Although plaintiff was jolted by the impact, it did not come in contact with the car ahead. Plaintiff further stated that the car which started the chain reaction did not remain at the scene.

Defendant Marshall testified at the trial that he was in the center lane of traffic going west, and was checking the lane to his left intending to move in that direction. He then

realized that an emergency situation was developing ahead as he observed a car cutting in front of the car in front of the plaintiff. Defendant applied his brakes and tried to turn left to avoid hitting the plaintiff. However, the right front of his car came in contact with the left rear of plaintiff's car. Defendant further stated that he did not observe plaintiff reduce her speed before she came to a complete stop. Due to a light rain, the defendant had his windshield wipers working and the pavement was damp.

Since the jury returned a verdict of not guilty in favor of the defendants, it is unnecessary to consider the extent of plaintiff's injuries.

On appeal, the plaintiff contends that the defendants were guilty of negligence as a matter of law; that the court erred in refusing to direct a verdict for her on the issue of liability; and that the verdict was against the manifest weight of the evidence. In arguing that the defendants were guilty of negligence as a matter of law, plaintiff cites Ceeder v. 203, Kowach, 17 Ill. App. 2d 202, / 149 NE 2d 766 (1958) and Kocour v. 311, Mills, 23 Ill. App. 2d 305, / 162 NE 2d 497 (1959). In both cases the plaintiff was stopped at an intersection, waiting for the red light to change, when his car was struck in the rear by the defendant's automobile. The Appellate Court, in those cases, held that the defendant was guilty of negligence as a matter of law. There were vehicles ahead which were stopped at a stoplight, and the defendants, upon approaching the intersection, were certainly expected to anticipate that traffic ahead was not moving. In the present case, there was nothing to warn the defendant, Marshall, that there were stopped vehicles ahead or that there would be a sudden stopping of traffic.

Plaintiff also cites Houchins v. Cocci, 43 Ill. App. 2d 433, 193 NE 2d 597, 600 (1963); Barnash v. Rikbovits, 46 Ill. App. 2d 409, 197 NE 2d 134, 136 (1964); and Williamson v. Spencer, 104 Ill. App. 2d 442, 244 NE 2d 325 (1969). Those cases are factually distinguishable from the present case. For example, in Williamson v. Spencer, the defendant was traveling at approximately 65 miles per hour in foggy weather when he struck the rear of the plaintiff's car, which had turn signals flashing. Clearly, under those facts, the defendant could have and should have anticipated the circumstances which developed.

The only case cited by either party, which involves a set of circumstances substantially identical to those in this case, is Jones v. Hutchins, 19 Ill. App. 2d 484, 154 NE 2d 304 (1958). In that case the situation involved a lane of cars traveling south on the Outer Drive in Chicago. Traffic was heavy; there were multiple lanes, and the number of lanes south-bound had changed or were about to change for the rush hour. A Yellow Cab driver, proceeding south on the Outer Drive, came to a sudden stop. The car directly behind him, driven by a Bruce Cross, also came to a sudden stop. An unidentified motorist, following Cross, immediately swung into another lane of traffic without stopping. Plaintiff's car, the next in line, crashed into the rear of Cross's car and almost immediately thereafter was struck in the rear by the defendant's car. A jury returned

a verdict for the defendant. On appeal, the plaintiff argued that the jury verdict was against the manifest weight of the evidence. At the trial, the defendant had testified that as he was preparing to pull to his left, he momentarily glanced in that direction; heard the sound of brakes; applied his own; but was too late to avoid crashing into plaintiff's car.' The court, in the Jones case, stated at pages 488 and 489:

"...There is no inherent vice in glancing back momentarily to supplement a rearview mirror blind spot; rather, such a check may well be an additional precaution. 'The duty to look has inherent in it the duty to see what is there to be seen, and to pay heed to it.' Mingus v. Olsson, 114 Utah 505, 201 P.2d 495. And in a later case, Spackman v. Carson, 117 Utah 390, 216 P.2d 640, the Utah court said: '...keeping a lookout ahead does not mean that the gaze must be glued incessantly on every object ahead. Such intenseness, aside from the strain, might actually detract from the necessity of over-all observation. The content of the duty to drive with reasonable care varies with the condition and circumstances ... Unless all reasonable minds must say that a party did not use due care under a particular set of circumstances, it is a question for the jury.' (Emphasis that of the Utah court.) Under the circumstances here set out, whether or not Hutchins' momentary glance backward constituted negligence was a question of fact for the jury to determine. In denying plaintiff's motion for a new trial, the trial judge, who saw and heard the witnesses, found that 'under the evidence of record the jury could reasonably have found or concluded: (1) That the defendant's act in merely glancing back momentarily did not constitute negligence, or (2) That the plaintiff was guilty of contributory negligence in not giving a proper signal to the defendant that he was about to stop; or (3) That in view of the emergency, neither was guilty of negligence.' The judge continued: 'Upon careful examination of the record, the Court finds that the verdict of the jury has a substantial evidentiary basis in the evidence....' We find the reasoning of the trial judge persuasive; under the circumstances we would not be justified in holding that the verdict was contrary to the manifest weight of the evidence."

Any of the conclusions which the jury could have made in the Jones and Spackman cases could have been made by the jury in our case. Under the circumstances here present, we believe that the defendant was not guilty of negligence as a matter of law. Therefore, the trial court was not in error in refusing

to grant plaintiff a directed verdict on the question of liability. In reaching this decision, we have followed the standards set out in Pedrick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 229 NE 2d 504 (1967) p. 510:

"Verdicts ought to be directed and judgments non obstante veredicto entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

Plaintiff repeats her prior arguments in supporting her contention that the verdict was against the manifest weight of the evidence. For the reasons previously stated in answer to plaintiff's other arguments, we feel that we are not warranted in holding that the verdict was contrary to the manifest weight of the evidence. There is a sufficient basis in evidence for the jury verdict.

The judgment of the Circuit Court of DuPage County is affirmed.

JUDGMENT AFFIRMED.

SEIDENFELD and GUILD, J.J., concur.

132 I.A. 246

UNITED STATES OF AMERICA

State of Illinois)
 Appellate Court) ss:
 Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
 Honorable GLENN K. SEIDENFELD, Justice
 Honorable WILLIAM L. GUILD, Justice
 HOWARD K. KELLETT, Clerk
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 17 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

JAN 17 1971

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

ROBERT WOODS,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court for
vs.	)	the 16th Judicial
	)	Circuit, Kane County,
RONALD McDOWELL,	)	Illinois.
)	
Defendant-Appellant.)	

PRESIDING JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

This appeal is from a bench trial decision wherein, after considering the facts of an intersection collision, defendant was found guilty of negligence and plaintiff, not guilty of contributory negligence.

Defendant contends that, as a matter of law, the operator of plaintiff's automobile was guilty of contributory negligence and that the contributory negligence of the operator of plaintiff's auto should be imputed to plaintiff.

The accident occurred at the corner of Illinois and Tenth Avenues in St. Charles; there are no traffic control devices at this intersection. No evidence was introduced to indicate one street more heavily traveled than the other. Plaintiff's auto was being driven by plaintiff's wife on her way to work; she testified that she looked but did not see defendant's

automobile until the accident occurred; that defendant hit the right rear portion of her car; that she was almost completely through the intersection when the collision occurred; that that she was going 30 to 35 miles per hour. Defendant testified that he was going 20 to 25 miles an hour; that he was near the middle of the intersection when the accident occurred; that he hit the right front door of plaintiff's automobile; that the plaintiff's wife told the police she saw defendant but thought she could make it across the intersection; and that he only saw her immediately prior to impact. On cross-examination, he admitted stating to the police that he did not see her car until he hit it.

The parties stipulated to the damages to plaintiff's automobile; hence, the repair bill, accurately detailing the section of the automobile damaged, was not introduced.

It is the law of this State that when two vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left must yield the right of way to the vehicle on the right. Ill. Rev. Stat. 1967, Ch. 95-1/2, Sec. 165 (b). However, the right of way granted to the automobile on the right is not absolute. The finder of fact must also consider the elements of speed and the relative positions of the parties in determining right of way and the resulting questions of negligence and contributory negligence. Bessette v. Loevy, 11 Ill. App. 2d 482 (1956); Bentley v. Olson, 324 Ill. App. 281 (1944).

" In determining whether plaintiff was contributorily negligent as a matter of law, the testimony favorable to plaintiff must be taken as true." Jines v. Greyhound Corp., 33 Ill. 2d 83, 86 (1965).

Considering the wife's testimony in this light, it is clear that she entered the intersection first and was almost through it when struck. Thus, she was not guilty of contributory negligence as a matter of law.

Defendant also claims that the verdict was against the manifest weight of the evidence. This argument is without merit. The testimony presents the precise question which our

judicial system requires be determined in the courtroom by the finder of fact. Plaintiff's testimony, standing alone, indicates that defendant was negligent; defendant's testimony, considered alone, indicates that plaintiff's wife was contributorily negligent. The conflict having been ruled upon by the finder of fact, this court will not disturb the conclusion of the trial court, even if we would have reached an opposite conclusion. Schulenburg v. Signatrol, Inc., 37 Ill. 2d 352, 356 (1967); Franklin v. Randolph, 267 N.E. 2d 337, 339, ____ Ill. App. ____ (1971).

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Seidenfeld and Guild, J.J. - Concur.

STATE OF ILLINOIS

APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge
HONORABLE JAMES C. CRAVEN, Judge
HONORABLE JOHN T. REARDON, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 17th day
of April A. D. 1971, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

FILED

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

APR 20 1971

Robert L. Conn, CLERK
APPELLATE COURT, 4TH DISTRICT
Agenda No. 70-66

General No. 11260

W. Bryan Jeffreys,

Plaintiff-Appellee

vs.

Bob Hickman, d/b/a Bob Hickman Ford
Sales, Inc., an Illinois Corporation,

Defendant-Appellant

Appeal from
Circuit Court
Coles County

REARDON, J., delivered the opinion of the court.

In this case the plaintiff seeks to recover cash damages from the defendant for an alleged breach of an oral contract to repaint the plaintiff's 1962 Chevrolet automobile. This contract was entered into in November, 1968. Pursuant to the contract the plaintiff paid the contract price of \$121 to the defendant upon the completion of the work. Plaintiff, in support of his claim, asserts that within one month after the painting was completed, he returned the automobile to the defendant's place of business because paint on the rear-quarter panel had begun to crack and blister off. The car was inspected by an agent of the defendant, who, according to plaintiff's testimony, agreed that something was "drastically . . . wrong."

Thereafter the painting on the car was retouched by the defendant, and the plaintiff testified that when he picked up the car, he was directed, in the event of further trouble, to bring the car back. The parties agree that about six months after the painting, the car lost its luster and brilliance and began to rust through, and the paint began to blister and crack off "all over". About ten months after completion of the painting, the automobile was returned to the defendant but the defendant refused to further rectify its work. Plaintiff testified that the defendant said it would not guarantee the paint job because the plaintiff had not come in earlier, and that it would not guarantee any paint job beyond ninety days. It is acknowledged that plaintiff's car, when originally taken to the defendant, had some rust on it due to a previous improper paint job.

In his brief, plaintiff argues that the defendant's agent persuaded him to believe that oxidation of the previously primered automobile would be alleviated if the plaintiff allowed the defendant to repaint the automobile. Plaintiff contends that it was mutually agreed that the defendant was to sand the car down to the metal where required, use primer where needed, and apply approximately five coats of paint. It appears from the record that the defendant did the work agreed to be done. Other than as indicated, it does not appear that the plaintiff specified just what work was to be done or what methods were

to be used in the repainting. The plaintiff contends that the statement of the defendant's agent that the rusted condition of the car would be alleviated was an express warranty, and urges that when the car again rusted and the paint blistered off approximately six months after the work was completed, an express warranty was breached. The defendant disagrees.

No evidence was offered that would infer or put plaintiff on notice that a question existed as to the likely success of the work.

Whether there is a warranty or an implication of warranty is determined not as a matter of law but, instead, as a matter of fact, and it is for the trier of the facts to determine from all of the evidence and circumstances surrounding the parties when negotiating and contracting. Economy Fuse & Mfg. Co. v. Raymond, 111 Fed. 2d 875.

The defendant insists that there were no warranties, either express or implied, and that it did what it contracted to do in a workmanlike manner, and argues:

- A. That nothing can be done to keep metal from rusting if repainting is done over old metal;
- B. That rust can be retarded only on a temporary basis; and,
- C. That there is no custom or usage in the trade guaranteeing paint jobs.

The defendant suggests that the painting of automobiles is not a complicated or sophisticated science or trade, and suggests that most men have common knowledge and experience in the area, and that since plaintiff knew of the previous bad condition of the paint it was unlikely that the plaintiff could expect a satisfactory paint job, and that therefore the parties stood on even footing and it would be unreasonable to conclude that the plaintiff could expect to obtain a paint job that would resist deterioration from weather or from prior encrustation of rust lying hidden from view under the old coats of paint.

It is significant to note that the record is silent as to the physical phenomenon that actually caused the deterioration of the paint job. Our task would be made easier if we knew that the paint failure was caused by continued rusting beneath the original paint, by weather conditions, by poor quality of paint, by improper application, by insufficient drying or some other physical cause. In this area the trial court did not furnish us with findings of facts or conclusions of law, nor have we been informed as to how damages were calculated in awarding judgment in favor of the plaintiff in the amount of \$121.

If the defendant was charged with a failure to fulfill warranties of skill, it is clear that the plaintiff would be required, as an essential element of his cause of action, to make a showing of the physical cause of the deterioration. The matter of physical cause is not one of law, but of fact. It is

apparent that the plaintiff, since he made no attempt to prove causation, relied upon the broader warranty of work for a known intended purpose, rather than for mere skillful workmanship.

In the present case the trial court undoubtedly found that warranties did attach to the negotiations between defendant and plaintiff. Although he did not expressly state which warranty or warranties he found to exist, ample evidence is in the record to conclude that the warranty was for the accomplishment of a known purpose, and this, of course, includes the lesser warranty, namely, the use of skillful workmanship.

Plaintiff's uncontradicted testimony is --

"The car had a faulty paint job on it and was to be repainted. There was rust on the car due to an improper paint job previous to that time, and I spoke with Mr. Rardin /defendant's agent/ and he agreed if I allowed him to paint it he could amend the situation by a new paint job."

Under these circumstances, it would appear that the trial court was justified in finding that the workman failed to provide services which accomplished the mutually known intended purpose, and that, under these circumstances, the failure of the plaintiff to designate and prove the exact cause is inconsequential.

The duty of dissipating the existence of warranties is upon the one who is performing the work. This can be done by proof of an express agreement to the contrary or by showing

that under the existing circumstances it is unreasonable to infer that the owner of the automobile actually relied upon any warranty, whether it be for mere skill in performance or adequate performance to a known intended purpose. It is apparent here that the defendant's agent, who claimed expertise and held himself out as knowledgeable in the field of automobile repainting, must assume certain responsibilities. First, he must be held to his duty of using skill, and second, if there is a warranty to accomplish a known intended purpose, to do those things necessary for the accomplishment of that result. If the work cannot be performed so as to attain the known intended purpose, the defendant should have so advised the plaintiff. In this case the plaintiff, during the negotiations, did not fix or prescribe any specific requirements upon the manner in which the work was to be performed. The defendant could not approach the work to be done with an advance exoneration of responsibility for the result. The defendant must assume responsibility for performance within reasonable standards. This court finds that the defendant in this transaction was the professional and that the evidence fails to shift from it the dual duties of skill and performance in its work toward the accomplishment of the known intended purpose, that is, to obtain a paint coat which would be serviceable for a reasonable period of time. To shift from itself the implications of warranties, the burden of proof is upon the workman. Adkins v. Lee, 138 Ill. App. 8; Art Craft Re-Roofing Co. v. Williams, 264 Ill. App. 477.

Since this court finds there was a broader, more extensive warranty to be implied from the circumstances surrounding

the parties, that is, that the work would be reasonably sufficient for the purpose or purposes for which it was intended, we must move to a decision as to what was the reasonable purpose intended. It seems obvious that the intended purpose of the work was to provide and assure, within economic limitations, a useful paint job for the 1962 Chevrolet automobile. We have already determined that the defendant was the professional or the dominant party to the transaction. For it even only to offer to undertake the work in the absence of exceptions or limitations suggests that the work was worth doing even on the poor, aged vehicle. A reasonable inference would force one to the conclusion that it would be foolish to expend the contracted price on the repainting of an automobile that would last only a few months. If the defendant knew, or if it, since it was the dominant knowledgeable party to the transaction, should have known that it was reasonable to anticipate only a short paint life, it had the burden of warning the plaintiff of that fact. If, on the other hand, it permitted the plaintiff to expect a usual paint life, then it is fair to imply that the defendant warranted that the paint job would serve the ultimate purpose known to both negotiating parties, that is, the enjoyment of a valuable coat of paint for a reasonable period of time. We conclude that it cannot be seriously contended that the repainting of a 1962 Chevrolet automobile in the year 1968, that would last for a period of only six months, is within the realm of credibility. If credible, then clearly the plaintiff should

have been warned of that possibility.

We now approach the question of the measure of damages. To determine what was the proper measure of those damages requires a prior determination of whether the performance done by the defendant constituted, in spite of its defects, substantial performance or was unsubstantial. If the performance was substantial, one set of rules applies. If the performance was unsubstantial, different measures are applicable. If the performance was substantial, the measure of damages is the cost of improving the property to bring it up to the condition it would have had if the workman had performed adequately pursuant to the contract. Rehr v. West, 333 Ill. App. 160, 76 N.E.2d 808 (1st Dist. 1948) (Abstr.). A different measure of damages applies for an unsubstantial performance. In the case of Scheppegrell v. Barth, 117 S.2d 903, a suit was brought by the owner of a home who had caused the interior to be repainted. The plaintiff could not account for the peeling and cracking of the paint by any phenomenon of nature or by any particular act of omission of the defendant. The paint job was a complete failure, and during the course of the opinion the review court observed that damages for the breach of a painting contract are usually the cost of repainting the defective work, but this rule is applicable only where the owner derives at least some benefit from the defective paint job. The court went on to find that the work performed was worthless and had to be completely redone, and found that the homeowner was entitled to be made

whole and entitled to claim the entire expense of repainting. To accomplish this the review court allowed, as damages, full refund to the owner based not specifically on the original contract price but upon the price of the new job as evidenced by bids. In the Scheppegrell case the court applied the doctrine of implied warranty of work to be done for a known intended purpose and found the work to be unsubstantial and compensated plaintiff for the price of an entire new job. No evidence is before us in this case as to what the cost of the repainting of the Chevrolet automobile would be. The trial court did not say which measure of damages was applied to reach the judgment of \$121. There is no evidence as to what the price of repainting would be. The trier of fact did have before him the amount charged by the defendant for the work. The trier of fact could infer that this contract price was reached as a result of arms-length negotiation between the parties, and therefore constituted a reasonable criterion of the price to be charged and one which the defendant has, in fact, negotiated and approved.

Accordingly, the decision of the trial court is affirmed.

Affirmed.

SMITH, P.J., and CRAVEN, J., concur.

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
MICHAEL CHUPICH,	)	Honorable James J. Mejda,
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Michael Chupich was convicted, following a trial by jury, of the offense of unlawful sale of narcotic drug [Ill. Rev. Stat. (1963), ch. 38, § 22-3]. Judgment was entered on the verdict and he was sentenced to a term of not less than twenty-five nor more than sixty years in the Illinois State Penitentiary.

ARST.

On appeal he contends:

1. that the trial court erred in permitting impeachment of a defense witness with an alleged prior inconsistent statement;
2. that he was denied a fair trial by reason of the prosecutor's alleged insinuation that a defense witness was mentally ill;
3. that reversible error occurred when the trial court instructed the jury in a manner which improperly limited the effect of the presumption of innocence;
4. that the trial court committed reversible error in improperly limiting cross-examination of a vital prosecution witness;
5. that reversible error occurred when the trial court failed to instruct the jury in the following particulars
 - (a) that the alleged prior inconsistent statement of a defense witness was to be considered for purposes of impeachment only and not as substantive evidence,
 - (b) that knowledge is an essential element of the offense charged,
 - (c) that the trial court failed to instruct the jury as to which drugs are considered narcotics for purposes of the offense charged;
6. that defendant was denied a fair trial by the improper remarks of the prosecutor during closing argument.

Inasmuch as defendant has not raised an issue of reasonable doubt, we will not set out the evidence in detail.

The evidence presented by the State establishes that the defendant sold quantities of heroin and cocaine to Charles Adams, a State narcotics inspector, the transaction being arranged by and conducted in the apartment of one Robert Hannah, a special employee of the inspector. Hannah was himself under indictment for sale of narcotic drugs at the time of this transaction.

Betty Riddiford, the only witness called by the defense, testified that she and Hannah conspired to and did "frame" the defendant with respect to the charge for which he was on trial. She further testified that she had agreed to aid Hannah in his effort to assist state agents in effecting three arrests in order to insure that Hannah himself would not be imprisoned for the offense for which he was indicted. It was her testimony that defendant was induced by Hannah and herself to hand certain packages containing narcotics to the state inspector and receive money from him, but that defendant was unaware of the contents of the packages and surrendered the money which he had taken from the inspector to Hannah when the inspector departed the premises.

On cross-examination the witness Riddiford was asked, over objection, whether she had made a statement in the presence of police sergeant Jerome Harmon to the effect that she was going to testify for the defendant because he had threatened that she would never see her children again if she did not. She denied having made such a statement. In rebuttal the State called Sergeant Harmon who testified as to Betty Riddiford having made a statement in his presence that she was going to testify for the defendant since he had indicated to her that she would never see her children again if she did not.

Defendant contends that it was error to allow cross-examination on the alleged prior inconsistent statement as it was

beyond the scope of direct examination and that the error was compounded by allowing Sergeant Harmon to testify as he did on rebuttal without first requiring a showing that the statement was voluntarily made. While it is true that the subject of this prior statement was not raised on direct examination, we cannot accept defendant's contention that the trial court abused its discretion in allowing it to be used for impeachment. By calling her as his witness defendant vouched for the credibility of Betty Riddiford and it then became proper for the prosecution to inquire into matters which might explain, modify, or even destroy her testimony on direct examination. The great probative value of this evidence with respect to the issue of the credibility of the witness is not questioned.

Further, we find no merit to defendant's contention that it was error to allow Sergeant Harmon to testify with respect to the statement without first requiring the State to demonstrate that it was voluntarily made. The reason for the requirement that an extrajudicial statement attributed to a defendant be shown to have been voluntarily made as a precondition to its admission even for purposes of impeachment does not exist where, as here, use of the statement does not present a circumstance in which the accused's Fifth Amendment privilege, not to be a witness against himself, may be endangered.

Defendant next contends that he was denied a fair trial by reason of what he terms the prosecutor's "insinuation" that the witness Riddiford was mentally ill. During the course of her cross-examination the prosecutor inquired if she had ever been in a mental institution. Before defense counsel entered his objection the witness responded in the negative. The defense objection to the question was then sustained. While we believe that the question was improper, we are unable to find that it could have resulted in substantial prejudice to the defendant, especially in

view of the witness' negative response and the trial court's prompt action in sustaining defendant's objection to the question.

Defendant also assigns as error an instruction given by the court which he asserts to have improperly limited the effect of the presumption of innocence. We do not deem it necessary to set out the instruction in full. The identical instruction, similarly challenged, was approved by this court in People v. Fortson, 110 Ill. App. 2d 206, 249 N.E. 2d 260 (1969). We adhere to that decision.

We also find defendant's contention that the court improperly limited cross-examination of prosecution witness Mrs. Eileen Hannah to be without merit. The record discloses that Mrs. Hannah testified on direct examination with respect to the movements of her son (Robert Hannah), defendant, and the state narcotic inspector as well as to statements made by each of them. On cross-examination, counsel for defendant presented in the form of a question an incorrect summary of her previous testimony and the trial court sustained an objection to the question on the grounds that the question did not accurately summarize her testimony. No further restrictions were placed upon cross-examination of this witness. We hold that the refusal of the trial court to allow defense counsel to place before the jury, albeit in the form of a question, a distorted summarization of the testimony of the witness was not erroneous.

Defendant's allegations of error with respect to the jury's not being instructed on knowledge as an element of the offense charged, on which drugs are properly characterized as narcotics, and the limited purpose for which Sergeant Harmon's testimony on rebuttal was admitted require no lengthy discussion. The record before us contains neither all instructions offered nor objections made at the conference on instructions. Even if it were to be conceded that some error did occur in instructing

the jury, it does not necessarily follow that the judgment must be reversed and the case remanded. Where the evidence of defendant's guilt is so clear and convincing that the jury could not reasonably have found him not guilty, error in instructing the jury does not require reversal People v. Truelock, 35 Ill. 2d 189, 220 N.E. 2d 187 (1966); People v. Cazaux, 119 Ill. App. 2d 11, 254 N.E. 2d 797 (1969). We find the evidence in the present case to be of such character.

Finally, it is argued that certain comments made by the prosecutor during closing argument were improper and denied defendant a fair trial. Our own careful scrutiny of the closing argument of counsel for the State has failed to reveal a transgression of the bounds of fair and reasonable argument in the light of the evidence presented and the contents of defense counsel's own closing argument. Accordingly, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and GOLDBERG, J., concur.

ARST

The trial court ruled correctly. In People v. Mitchell, 45 Ill.2d 148, 258 N.E.2d 345 (1970) and People v. Bak, 45 Ill.2d 140, 258 N.E.2d 341 (1970), it was held that: probable cause for issuing a search warrant having been determined by a judicial officer, a defendant would not be allowed to challenge the warrant by controverting the factual allegations in the affidavit upon which

the warrant was based. See also People v. Nakon, 46 Ill.2d 561, 264 N.E.2d 204 (1970); People v. Healy, 126 Ill.App.2d 189, 261 N.E.2d 468 (1970).

The judgment is affirmed.

Affirmed.

McNamara, P.J., and Schwartz, J., concur.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

EDWARD J. WHALEN,

Plaintiff and Counter-defendant, Appellee,

vs.

MARY WHALEN,

Defendant and Counter-plaintiff, Appellant.

:
: Appeal from the Circuit Court
: of Cook County, Illinois.
: Divorce Division.

:
: Honorable Raymond Drymalski,
: Judge Presiding.

ARST.

EBERSPACHER, P. J.

The plaintiff husband, Edward J. Whalen, filed a complaint for divorce against the defendant, Mary Whalen, who filed a cross-claim for separate maintenance. After trial before the court the plaintiff obtained judgment upon his complaint and was granted a decree of divorce from the defendant, and the counterclaim was dismissed. The defendant appeals from the judgment in favor of the plaintiff.

The appellant asserts two issues for this Court to decide. The appellant contends that the verdict of the trial court is not supported by the evidence and is against the manifest weight of the evidence. The second assertion is that the Chancellor erred in entering an amended decree which materially changes and enlarges the original decree more than thirty days after entry of the original decree. We shall consider first whether the trial court was correct in entering an amended decree.

The original complaint was filed by the husband on September 23, 1966, and on December 28, 1966 an amended complaint was filed. The wife filed a counter-claim for separate maintenance on December 30, 1966. Trial was held before the Chancellor on May 7, 1968. The court found, "3. That defendant Mary Whalen is guilty of the charges stated in the Complaint for divorce and Edward J. Whalen is entitled to a divorce". Also the Court, among other things, awarded care and custody

of the parties' minor children to the defendant, and ordered the plaintiff to pay for their support. There is no contention made that either the provisions for the division of property, for custody, or support payments are inequitable.

On June 6, 1968, defendant's present attorneys entered their appearance and filed a motion requesting additional time to file post-trial motions. Leave was so granted by the court and post-trial motions were filed on behalf of the defendant on July 1, 1968. The hearing on post-trial motions occurred on August 5, 1968, at which time the defendant's post-trial motions were denied and the plaintiff was granted leave to amend the Decree by adding the word "amended" in front of the word "Complaint" in the appropriate places. The Amended Decree of Divorce was entered on August 16, 1968. The Amended Decree of Divorce as entered provided in lieu of the original paragraph 3 of the findings: "That defendant Mary Whalen committed adultery with one Edward Buckley on May 12, 1964 and also on August 17 and 18 of 1966; further that following the first act of adultery the parties resumed the marital relationship for a period of about two weeks up to June 15, 1964, and that subsequently thereto this first act of adultery by the defendant was revived by her conduct in that she consistently refused to have marital relations with the plaintiff, corresponded with said Edward Buckley, struck the plaintiff, and consorted with said Edward Buckley on August 17 and 18, 1966". Further, the first paragraph of the order of the original decree was changed from "1. That the bonds of matrimony heretofore existing between Edward J. Whalen and Mary Whalen are hereby dissolved on the grounds stated in plaintiff's Complaint for divorce;" to "1. That the bonds of matrimony heretofore existing between Edward J. Whalen and Mary Whalen are hereby dissolved on the grounds that Mary Whalen committed adultery and that plaintiff Edward J. Whalen is granted a divorce".

The defendant contends that the court had no jurisdiction to enter the amended decree after thirty days from the entry of the original decree. The defendant cites the cases of *Chapman v. North American Ins. Co.*, 292 Ill. 179 and *In re Estate of Schwarz*, 63 Ill. App. 2d 456. The Chapman case, involving a default judgment which

is not the circumstance of the instant case, stated the court could not review a judgment after the last day of the term of the court has ended. The Schwarz case concerns itself with whether the Probate Court of Cook County could entertain a second motion to vacate a denial of probate of a will. The court dismissed the appeal from the denial of the second motion to vacate. The two cases cited by the appellant are not persuasive.

There is no question, and indeed the appellant does not assert, that the court could have modified the original decree in granting appellant's post-trial motions that were denied on August 5, 1968. Chap. 110, § 50. (5), Ill. Rev. Statutes provides in part "The Court . . . may on motion filed within 30 days after entry thereof set aside any final order, judgment or decree upon any terms and conditions that shall be reasonable". We conclude that the trial court had jurisdiction to modify the original decree. *Stephans v. Chicago Transit Authority*, 28 Ill. App. 2d 229, 171 N.E. 2d 229 (1960) "At common law the trial court exercises jurisdiction over a cause until the end of the term, during which time the court has authority to modify and vacate its orders in the interest of justice. (Case cited) The Civil Practice Act has not abrogated the trial court's authority in this regard". The appellant's post trial motions timely made, extended the trial court's jurisdiction beyond the thirty day period. *James v. James*, 14 Ill. 2d 295, 152 N.E. 2d 582 (1958).

The appellant next asserts that the decree is not supported by the evidence and is against the manifest weight of the evidence. We have thoroughly reviewed the record and we cannot find that the court abused its discretion. A recital of the facts and circumstances which led finally to this divorce would serve little or no purpose and would in no manner or way serve the purposes of justice. The record is replete with the substantiated wrongdoings of the defendant and unsubstantiated charges against the husband. "The trial judge who sees the witnesses and hears the evidence is in a much superior position to find the truth than is a reviewing court which has before it only the printed page. The weight to be given the testimony and the credibility of the witnesses are matters which are within the trial judge's province. Where

a trial judge has heard witnesses give oral testimony, his findings will not be disturbed unless they are plainly erroneous and contrary to the manifest weight of the evidence". Johnson v. Fischer, 108 Ill. App. 2d 433 (1969); see also Hunter v. DeMay, 124 Ill. App. 2d 429, 259 N.E. 2d 291 (1970).

Judgment Affirmed.

CONCUR: /S/ Honorable George L. Moran J

CONCUR: /S/ Honorable Charles Jones J

132 I.A.² 443

53679

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
vs.)
)
L. C. BENSON,)
)
Defendant-Appellant.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

Hon. Thomas R. McMillen,
Presiding.

ABST.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

L.C. Benson was convicted, following a trial by jury, of the offenses of murder (Case No. 67-693) and aggravated battery (Case No. 67-694). Judgment was entered on the verdict and he was sentenced to terms of not less than fifteen nor more than twenty-five years for murder and not less than five nor more than ten years for aggravated battery.

On appeal he contends that he was not proven guilty beyond a reasonable doubt, that he was deprived of a fair trial due to the prejudicial remarks of the prosecutor, and that the trial court erred in the following particulars: (a) in instructing the jury on flight when the evidence did not support such instruction, (b) in failing to instruct the jury on the law of self-defense which was defendant's theory of the case, (c) in sentencing him on each of the charges and in providing that the sentences run consecutively as the offenses charged arose out of a single course of conduct.

Marion Evelyn Young was called as a witness on behalf of the State and testified as follows. Between 11:30 and 12:00 P.M. on December 31, 1966, she received a telephone call from the deceased, Edward Billie Jackson, a friend of some twenty-six years standing. The purpose of the call was to suggest his celebrating the coming of the New Year with her at her apartment. She acquiesced in the suggestion and prepared for his arrival by removing a bottle of champagne which he had given her for Christmas from the refrigerator and placing it on a table along with two

glasses. At this time she was alone in the apartment and all the doors and windows were securely locked.

Jackson arrived at her apartment approximately ten to fifteen minutes later, and when she opened the door to admit him she discovered, to her surprise, that he was accompanied by another man whom she identified as the defendant. The two men appeared to be on friendly terms. She admitted the men to the apartment and took their outer garments from them. The deceased was wearing a brown coat and grey hat, but had no boots, and was carrying a camera. Defendant's outer apparel consisted of a black or dark blue coat, black hat, and galoshes.

The three entered the living room and engaged in conversation and defendant asked her for a glass of ice water. She advised him that she had no ice, but that if the water were allowed to run it would become cold enough to drink. She then retired to the kitchen, passing through the dining room which separated the living room from the kitchen. Jackson and the defendant remained in the living room. No other person was in the apartment and all the doors and windows were securely locked, the front door through which the men had entered locking "automatically" when closed.

Once in the kitchen, Mrs. Young turned on the tap and, while allowing the water to run, busied herself by putting away certain canned goods which she had purchased earlier. While in the kitchen and so engaged, she noticed a bright flash of light, as from a flash bulb. She returned to the sink with a glass to draw water for defendant when she heard Jackson exclaim, "Oh my God, you mean I brought you down here for something like this?" The statement was followed by the sound of two or three gunshots which appeared to come from the direction of the living room. The sound startled her, causing her to drop the glass in the sink.

Still standing at the sink, she looked over her shoulder

and observed the defendant standing in the doorway between the dining room and kitchen. He had a "wild look" on his face and there was a gun in his hand, which he pointed at her. He was standing only four or five feet from her and fired the gun, striking her in the left wrist. She asked him, "Why"? but he did not respond. Again she inquired, "What have I done to you"? He said nothing and fired the gun twice more, each bullet striking her in the back. She then fell to the floor but did not lose consciousness. She feigned death and heard the defendant run through the apartment and out the front door, slamming it behind him.

Mrs. Young then pulled herself from the floor and went into the living room where she found Jackson lying on the floor in front of the couch. He appeared to have a large wound in his chest. She remained with him for a few minutes, until he stopped breathing, and then laboriously made her way to the telephone, located in the dining room, and phoned the police.

After the police arrived and began to question her she informed them that she had been shot. When they began to remove her to the hospital for treatment, she informed them that she believed that a picture of the offender had been taken with the deceased's camera, which was lying on the couch. She then identified State's Exhibit No. 5 as a picture of the defendant. She also identified items of household furniture and Christmas decorations visible in the background of the picture as her own. She testified that there had never been a picture of defendant taken in her apartment except on the night in question. Mrs. Young also identified State's Exhibits 2, 3 and 4, the hat, coat and galoshes, left in her apartment by defendant on the night in question.

Officer Frederick Chapman testified as to the condition of Jackson and to his finding two spent pellets in the apartment,

one in the kitchen and one in the living room floor. He also testified that Mrs. Young informed him she believed a picture of the offender to have been taken with a camera, State's Exhibit No. 13, which was lying on the couch.

Detective Dale Beuhler also called on behalf of the State, testified that he was assigned to investigate the murder of Jackson. He arrived at the scene and removed from State's Exhibit No. 13, a polaroid camera, State's Exhibit No. 5, the photograph previously identified by Mrs. Young.

Other evidence presented by the State established a chain of possession of the pellets found in the apartment and also that of one removed from the body of the deceased. Expert opinion evidence was then introduced to the effect that all three of these pellets were fired from the gun which was recovered from the defendant's room.

L.C. Benson was arrested the following day, January 2, 1967, at his residence. The gun referred to above, a .38 caliber Colt revolver was recovered from a dresser drawer at the time of his arrest. No issue with respect to the admissibility of the weapon is raised on appeal.

Defendant testified on his own behalf, relating the following version of the events leading to and including the shooting. He met the deceased, an acquaintance of some six months on an "L" train at approximately 8:00 P.M. They spent some time drinking together, first at a lounge and then at deceased's apartment. While at the apartment, deceased took a picture of him. Thereafter deceased made a telephone call. He then asked defendant to accompany him to the home of a friend and defendant agreed. They proceeded to the apartment of Mrs. Young. When they arrived, another man, who was introduced to defendant only as Jack, was present. Jack's shirt was outside his pants and was unbuttoned. He was drinking champagne.

Mrs. Young remained in the kitchen most of the time. Jack went into the kitchen with her and when he came out Jackson went in. This procedure was repeated and finally both Jack and Jackson were in the kitchen with Mrs. Young. Defendant remained in the living room, and it appeared to him that an argument was raging in the kitchen. Jack, Jackson and Mrs. Young emerged from the kitchen together. Defendant noticed that Mrs. Young had a gun in her hand. When they reached the vicinity of the living room, Jack began to struggle with her for the gun and wrested it from her.

Jack began to fire the weapon and defendant, believing that the shots were being directed toward him, drew his own gun and returned the fire. Jack was firing so rapidly however, that defendant decided to run. He dashed from the apartment, leaving his hat, coat, and galoshes behind. At this juncture he was feeling the effects of the alcohol which he had consumed earlier, but he was not intoxicated. He could not remember where he went following his retreat from the apartment, but when he awoke the following morning he was at home.

Finally defendant testified that he was not aware that anyone had been hit during the melee in the Young apartment. He had telephoned Jackson's apartment on the day following the incident, but the phone went unanswered. He assumed that Jackson was merely not at home.

Three character witnesses, including his brother and sister, testified on behalf of defendant with respect to his reputation for "peacefulness."

Defendant first contends that he was not proven guilty beyond a reasonable doubt. He urges that the testimony of Mrs. Young is beyond the "laws of nature" and contrary to human experience and therefore not worthy of belief. Specifically, he points out that she testified that he and the deceased appeared

to be friendly when they entered her apartment and she heard no argument between them subsequent thereto. He concludes that her testimony, that one friend shot another and her without provocation is contrary to human experience, and therefore not worthy of belief. He also asserts that his own version of the facts surrounding the firing of shots is inherently more believable.

While this court must give due credence to the determinations of fact made by the jury, we must also view the record with utmost care in cases such as the present where the liberty of an individual is at stake. We have, therefore, carefully reviewed the evidence in this case but are unable to agree with the defendant that the testimony of Mrs. Young is inherently unbelievable. His argument with respect to her testimony ignores the vital link which serves to connect the otherwise apparently inconsistent facts to which she had testified, i.e., the seemingly friendly relationship between defendant and the deceased and the shooting of deceased, inferentially by defendant, without provocation. The connection is made by Mrs. Young's testimony with respect to the exclamation made by Jackson immediately before the shots were fired. That remark is indicative of surprise and fairly supports an inference that Jackson observed something which was inconsistent with an atmosphere which he had believed to be friendly. The jury may fairly have concluded that Jackson's remark was precipitated by an imminent assault upon his person by another, the defendant.

Further, it is defendant's version of the incident which we find to be unbelievable. It is inconceivable that the defendant would have escaped unharmed and the apartment bear no evidence of the gunplay which defendant attributes to his alleged aggressor, Jack, who insofar as the testimony of the State's witnesses was concerned, was non-existent.

Defendant's contention that certain remarks made by the

prosecutors during the course of closing argument deprived him of a fair trial need be dealt with only briefly. No effective objection was made to two of the comments. In the absence of such objection and a ruling by the trial court, the question of possible prejudice caused by the comments is not before us.

People v. Hampton, 44 Ill. 2d 41, 253 N.E. 2d 385 (1969). Objection was made to the comment of the prosecutor with respect to the postponement of opening argument by the defense until the State had presented its case in chief. Any error which may have occurred here was waived when defense counsel, during his own closing argument, again brought the statement of the prosecutor to the attention of the jury.

The comment of the prosecutor alleged by the defendant to be prejudicial was a characterization of defense counsel's argument as unprofessional insofar as he accused the prosecutors of wrongdoing. We find the comment to be within the bounds of propriety, if but barely, as responsive to no fewer than seven references made by defense counsel to alleged misconduct on the part of the prosecutors, i.e., hiding evidence.

We find a fair reading of the record to belie defendant's contention that the prosecutor indicated, contrary to the evidence, that the coroner's physician who testified as to the cause of death identified State's Exhibit No. 7 as the bullet which killed Edward Jackson. While the statement of the prosecutor was not in favored grammatical form, we do not believe that it could have misled the jury in light of the evidence establishing the chain of possession of the bullet removed from deceased's body to the Chicago Crime Laboratory where it was identified as having been fired from defendant's gun.

Neither can we accept defendant's contention that the trial court committed reversible error in refusing to instruct the jury on self-defense. Section 7-1 of the Criminal Code

describes those situations where force may be justified under the theory commonly known as self-defense.

A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony. (Emphasis supplied.)

Even under defendant's version of the facts that section, by its own terminology, has no application where, as here, the alleged aggressor is not the party who has suffered harm at the hands of the accused. The exoneration provided by that section applies only where it is the aggressor who suffers the harm. We do not accept defendant's unstated premise, that section 7-1 provides exoneration for any harm done to any person.

Defendant has also assigned as error the instruction given by the trial court on flight. He contends (a) that there was not sufficient evidence to support an instruction on flight, and (b) that even if an instruction on flight were warranted by the evidence, the one given was ambiguous since the term "flight" was not itself defined. While we are compelled to agree that the giving of an instruction on flight in the present case was, at best, questionable, we do not find that it could operate to the substantial prejudice of the defendant, given the overwhelming evidence of his guilt. Cf. People v. Stewart, 46 Ill. 2d 125, 262 N.E. 2d 911 (1970).

Finally, the defendant has argued that the court erred in sentencing him on both charges and in directing that the sentences run consecutively, in that both offenses arose from a single course of conduct, a volley of shots which resulted in injury to two persons, citing People v. Ritchie, 66 Ill. App. 2d 302, 213 N.E. 2d 651 (1966) as well as section 3-4 (iii) (iv) of

the American Bar Association Approved Draft, 1968, Sentencing Alternatives and Procedures.' He also argues in the alternative that the language used by the trial court at the time of sentencing was not effective to impose consecutive sentences in that it is not clear from the language of the court that the second sentence is to commence at the expiration of the first, citing People v. Kessler, 15 Ill. 2d 514, 516, 155 N.E. 2d 620 (1959).

Section 1-7(m) of the Criminal Code allows the trial court, in the exercise of its discretion, to impose consecutive sentences when an accused is convicted of two or more offenses which did not result from the same conduct. This section has been construed to prohibit consecutive or concurrent sentences where a person has been convicted of two offenses resulting from the same conduct. (See People v. Raby, 40 Ill. 2d 392, 240 N.E. 2d 595 (1968)). It is the contention of defendant that the two offenses of which he stands convicted arose from the same course of conduct, a volley of shots. The evidence presented by the State indicates that both victims were not injured by the same volley of shots. Rather, Mrs. Young testified that deceased was in the living room when shot, that defendant was standing in the doorway between the dining room and kitchen when he fired at her, and that there was a time interval between the shots.

In People v. Johnson, 44 Ill. 2d 463, 256 N.E. 2d 343 (1970), the Supreme Court held that section 1-7(m) has no application in cases, such as the present, where the offenses arise from a series of closely related acts and the crimes are clearly distinct, requiring different elements of proof. The assault upon Jackson which resulted in his death was distinct from, separated in time from, and complete at the time of the battery upon Mrs. Young. While it may be said that the assaults perpetrated upon the victims were closely related, they did not both result

from the same conduct under the holding in Johnson. We therefore hold that the trial court did not err in imposing separate sentences for each of the offenses proved.

As noted above, the determination of whether sentences are to run consecutively or concurrently is left to the discretion of the trial court. We find nothing in the present case to indicate that the trial court abused its discretion on the matter of sentencing. On the contrary, we note that here, where the evidence established an apparently unprovoked assault resulting in death, the minimum set by the court is only one year above the minimum sentence allowed by statute for the offense of murder. Under such circumstances we cannot say that the determination by the court that the sentence imposed for aggravated battery, also apparently unprovoked, should run consecutive to that imposed for murder constituted an abuse of discretion.

We also find defendant's alternative argument that the language used by the court was insufficient to impose consecutive sentences to be without merit. The written order entered, set out in pertinent part below, clearly indicates that the sentence for aggravated battery is to commence to run at the expiration of the sentence imposed on the conviction for murder.

IT IS FURTHER ORDERED and ADJUDGED by this court that the imprisonment of said Defendant L. C. Benson under the sentence imposed herein against him in the instant pending cause Number 69-694, SHALL NOT COMMENCE UNTIL THE EXPIRATION of the imprisonment under the sentence of the defendant for the crime of murder in manner and form as charged in the indictment in cause Number 67-693.

The same can be said of the comments of the court:

" . . . I am going to sentence the defendant to a term of not less than fifteen and not more than twenty-five years in the Illinois State Penitentiary on the charge of murder.

I don't agree with the State's recommendation that these offenses should be punished with concurrent sentences. I feel they were two separate, deliberate criminal acts here which should be punished by successive sentences. I am going to sentence the defendant, on the aggravated battery charge, to not less than five and

not more than ten years in the Illinois State Penitentiary, to be successive to the sentence in the murder charge."

The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and GOLDBERG, J., concur.

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53737)
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53739)

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
vs.)
)
RAYMOND HUDSON, OTIS ELDER and)
WILLIAM McNAIR,)
)
Defendants-Appellants.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

Hon. Thomas R. McMillen,
Presiding.

ABST.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

Defendants Raymond Hudson, Otis Elder and William McNair were all confined in the House of Correction, Chicago. After an assault which took place within the prison on May 16, 1967, all three of them were indicted for the murder of Anthony Novotny, also a prisoner.

The indictment contained three counts. Count One charged murder as defendants knew that their acts created a strong probability of death or great bodily harm to deceased. (C. 38, §9-1(a)(2)). Count Two charged murder in that defendants intentionally and knowingly and without lawful justification inflicted mortal wounds. (C. 38, §9-1(a)(1)). The Third Count charged defendants with involuntary manslaughter in that they recklessly and without lawful justification beat Novotny and inflicted mortal wounds. (C. 38, §9-3(a)).

After a jury trial, all defendants were found guilty of murder. They were sentenced to terms of imprisonment: Hudson, 16 to 22 years; Elder, 14 to 20 years and McNair, 18 to 25 years. Defendants' contentions are:

1. The trial court improperly imposed sentence upon a verdict of which he did not approve.

2. The State failed to prove defendants guilty beyond a reasonable doubt.

3. The introduction of evidence of a previous conviction of defendant McNair deprived him of a fair trial and due process of law.

4. The introduction in evidence of a subsequent assault by defendant Hudson upon a witness for the prosecution was reversible error.

We will first consider the last three points; commencing with the argument regarding weight of the evidence. This requires a recital of the pertinent facts. The deceased entered the House of Correction on May 9, 1967, for a psychiatric evaluation. He was then approximately 57 years old. All three of the defendants were then also prisoners. Hudson was assigned to various duties such as sweeping the gallery, handling laundry and assignment of new prisoners to cells. Defendant Elder was a "gallery man". McNair was a "gallery runner". Their respective duties are not clearly defined here. Johnnie Hunt was the guard assigned to the area in which all defendants and deceased were confined.

This portion of the House of Correction has several floors of cells. The bottom tier of the west cell house is known as "K" gallery and the next tier above is referred to as "L" gallery. On May 16, 1967, the deceased was assigned to a cell in "K" gallery. However, that afternoon he was out of his cell and running up and down the gallery. He refused to enter his cell when so ordered by the guard. The guard and some prisoners forced deceased into his cell and beat him. Then, on orders of the guard, the prisoners dragged deceased out of his cell and up the stairs to "L" gallery. There, he was locked into a "strip cell". This is a cell of ordinary size but without toilet, washbowl or bed. It is used for restraint of psychopathic prisoners to prevent their injury.

A prisoner named Ronald Little testified for the State that during this process defendant Hudson punched at the deceased but perhaps failed to strike him. He testified that Elder struck and punched Noyotny and jumped on his hand while he was lying on the floor. He also testified that McNair was present during the affray and at one time entered the cell on "K" gallery after deceased had been returned there. This witness further testified that all three of the defendants beat deceased while he was being forcibly dragged to the strip cell.

Alonzo Smith, also a prisoner, testified that the deceased was running up and down "K" gallery and that the affray commenced when the guard was attempting to return him to his cell. He testified that Hudson beat the deceased with his fists about his face, stomach or chest and that defendant Elder held deceased during this time. Another prisoner, Donald Borsch, testified that he saw all three defendants strike and beat the deceased on the floor of "K" gallery and that the beating continued while the deceased was being dragged upstairs.

James Montgomery, another prisoner, testified that, after the deceased had been returned to his cell, all three of the defendants entered the cell and beat him; to the extent of picking deceased up and throwing him against the toilet bowl. Montgomery further testified that the three defendants then took deceased to the upper gallery, struggling with him on the way.

Five other prisoners testified for the defense. The substance of their evidence is that there was a violent confrontation between the deceased and the guard. They testified that none of the defendants was present during this occurrence. None of these witnesses at any time saw any of the defendants participate in any assault upon the deceased. Each of the three

defendants testified in his own behalf. All of them categorically denied knowledge of assault or beating of the deceased within the prison by any person at any time.

The uncontradicted evidence shows that deceased suffered a violent death. When he entered the prison on May 9, 1967, he had no apparent physical problem. On the afternoon of May 16, 1967, he appeared weak and cyanotic with almost imperceptible pulse. He had a black eye and discolored arms. He died on May 17, 1967. Post mortem examination showed that the deceased had a fractured fourth rib, multiple body and abdominal bruises and discolorations, including a black eye, and also a strangulated hernia which had caused peritonitis. An expert testified that this hernia was caused by external violence to the abdominal wall. Undoubtedly, death was caused by external nonpenetrating trauma inflicted on May 16, 1967.

From the above recital, and from our examination of the entire record, it appears that the innocence or guilt of all three of the defendants was entirely a question of fact for determination by the jury. The blanket denials made by all three defendants sufficed only to raise an issue for the jury regarding credibility of the witnesses and the weight of their testimony. *People v. McKibbins*, 128 Ill. App. 2d 175, 180. We cannot reject the verdict of guilt by the jury which is based upon sufficient credible evidence to support it beyond reasonable doubt. *People v. Nelson*, 127 Ill. App. 2d 238; *People v. Boyd*, 105 Ill. App. 2d 345, 349-350; *People v. Najera*, 75 Ill. App. 2d 127, 131; *People v. Cool*, 26 Ill. 2d 255, 258; *People v. Hairston*, 46 Ill. 2d 348, 366.

On oral argument, counsel for defendants earnestly urged that we consider separately and independently the innocence or

guilt of each defendant. Having scrupulously adhered to this proper suggestion, we must conclude that the evidence as to each individual defendant is amply sufficient to prove beyond a reasonable doubt that all three defendants assaulted and beat the deceased and thus caused his death. However, the grade of this homicide will be considered after passing upon the remaining defense contentions.

Defendant McNair next urges that introduction in evidence of a certified copy of his prior conviction of burglary prevented him from receiving a fair trial and violated his right to due process of law. The record shows that counsel for McNair objected when the State's Attorney attempted, improperly, to prove the prior conviction by cross-examination. Timely objection by defense counsel was sustained, the question was stricken and the jury was instructed to disregard it. Thereafter, the duly certified record of the previous conviction for burglary was read in evidence without objection. This defense contention must be rejected for these reasons:

(a) The objection to the certified proof cannot be raised in this court for the first time. *People v. Ridener*, 129 Ill. App. 2d 105 (evidence of unrelated crime); *People v. Davis*, 126 Ill. App. 2d 114, 117 (hearsay evidence); *People v. Eubank*, 46 Ill. 2d 383, 387, 388 (constitutionality of identification); *People v. Harris*, 33 Ill. 2d 389 (allegedly illegal arrest, search and seizure).

(b) The statute expressly sanctions proof of the conviction of infamous crime against a defendant who testifies. C. 38, §155-1. This practice has been approved by our reviewing courts in a myriad of decisions from *Bartholomew v. People*, 104 Ill. 601 (opinion by Mr. Justice Scholfield) to *People v. Bey*, 42 Ill. 2d 139

with People v. Humphrey, 129 Ill. App. 2d 404, 414; People v. Tinsley, 128 Ill. App. 2d 440, 445; People v. Gilmore, 118 Ill. App. 2d 100, 104-105; People v. Branscomb, 116 Ill. App. 2d 385, 396 and many, many others in between.

(c) No constitutional issue concerning the certified proof was raised by defendant in the trial court or there decided. Defendant's motion for new trial (Para. 47) specified only the attempt to prove the previous conviction on cross-examination. A nonjurisdictional constitutional question may not be raised here for the first time. People v. Eubank, 46 Ill. 2d 383, 394; People v. Valentine, 60 Ill. App. 2d 339, 347; People v. Webb, 80 Ill. App. 2d 445, 449; People v. Bibbs, 115 Ill. App. 2d 200, 204.

Unfortunately for defendant's contention, People v. Gregory, 22 Ill. 2d 601, cited by him, goes to a completely different and unrelated problem. There, proof was made of participation by defendants "in separate and unrelated crimes," 22 Ill. 2d at page 602. This was done by written confessions of the defendants which were received in evidence. People v. Shook, 35 Ill. 2d 597, also relied on by defendant McNair to support this contention, involved evidence of a prior conviction which had been nullified and voided by a habeas corpus petition.

We are aware of the decision of our Supreme Court in People v. Montgomery, Docket No. 42403, Ill. 2d . This case, decided after all briefs had been filed in the case at bar, imposes discretionary restrictions upon certified proof of previous convictions. However, this new ruling is not applicable to the instant case because the Supreme Court has expressly limited it to cases tried after its adoption. We find no error in permitting proper certified proof of a previous conviction of infamous crime by defendant McNair when he testified in his own behalf.

The next contention applicable to defendant Hudson, is that evidence given by the witness, Ronald Little, that Hudson beat and threatened him to prevent him from testifying, was prejudicial and improper. This testimony was not denied by Hudson. Defendant Hudson cites and depends upon *People v. Cage*, 34 Ill. 2d 530. This case is not pertinent here. It involved attempted proof by the State of other offenses by defendant. Defendant there was found guilty of a murder which occurred during robbery of a candy store and the State's theory was that evidence of robberies in other stores was relevant to show existence of a conspiracy to rob neighborhood stores. The testimony here as to the alleged assault upon the witness was offered for a completely different purpose. It was intended to show attempted intimidation of a witness as relevant to the existence of consciousness of guilt in the defendant's mind. This evidence was competent, relevant and proper and the trial court did not err in receiving it. *People v. Gambony*, 402 Ill. 74, 80; *People v. Townsend*, 111 Ill. App. 2d 316, 321-322; *People v. Hudson*, 106 Ill. App. 2d 130, 138.

We now turn to consideration of the very first point raised by all defendants; namely, that the sentence was improperly imposed upon a verdict of which the trial court did not approve. As above stated, careful and extended consideration of all the evidence leaves us with a clear conviction beyond reasonable doubt that each of the defendants forcibly assaulted and beat the deceased and thus caused his death. However, we must also consider the evidence with reference to guilt of the specific crime of murder.

The trial judge expressed the opinion that the evidence seemed to be "more in line with involuntary manslaughter than murder". We believe that in making this statement the careful trial judge could well have had in mind the status of the three

defendants as prisoners and the fact that they were summoned to the scene of the initial affray by the guard. There is evidence that the guard directed defendants to take the deceased from his own cell to the so-called strip cell. The defendants accompanied the guard into the strip cell in which deceased was placed. Since the guard had the pass key to this cell, it would appear that the defendants necessarily acted with the knowledge of the guard.

These circumstances lead to the conclusion that, in their assault upon the deceased, defendants acted in a manner far more consistent with involuntary manslaughter than with murder. The record is bare of any motive or reason for murder.

The trial judge properly instructed the jury on the issues of manslaughter as alleged in the indictment. Also, the trial court properly entered judgment upon the verdict. His only alternative authority was to set aside the verdict and grant a new trial. (Compare C. 38, §116-1 with C. 38, §116-2. The latter is clearly not available here. *People v. Irwin*, 32 Ill. 2d 441, 445). However, this court is specifically authorized "to reduce the degree of the offense of which the appellant was convicted," (Supreme Court Rule, 43 Ill. 2d R. 615(a)(3)). This court has had occasion to reduce the grade or degree of the offense in proper cases. *People v. Cooke*, 93 Ill. App. 2d 376, 385-386; *People v. Kelly*, 56 Ill. App. 2d 204, 211-212; *People v. Bailey*, 56 Ill. App. 2d 261, 277; *People v. Walker*, 55 Ill. App. 2d 292, 302-303.

On this basis, since we find under the evidence that all three of the defendants are guilty of involuntary manslaughter, we reverse their conviction for murder. We remand these cases to the Circuit Court with directions to enter a finding of guilty of involuntary manslaughter as to each defendant and to impose a sentence for that crime upon each defendant appropriate to the facts and circumstances of this cause and to any addi-

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tional matters in aggravation or mitigation which be made available to the trial court by the State and by each and all of the three defendants.

REVERSED AND REMANDED
WITH DIRECTIONS.

BURKE, P. J. and LYONS, J., concur.

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53968-54427

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
CHARLES CUNNINGHAM,	)	Hon. Reginald J. Holzer,
	)	Presiding.
Defendant-Appellant.)	

ABST.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant, Charles Cunningham, was charged with the murder of his wife in violation of Ill. Rev. Stat. (1965) ch. 38, § 9-1. Following a bench trial, the defendant was found guilty and was sentenced to the Illinois State Penitentiary for not less than twenty nor more than thirty years.

On appeal, the defendant contends that:

- (1) the evidence did not prove him guilty beyond a reasonable doubt;
- (2) the trial court erred by failing to take judicial notice of the effect of 174 milligrams of alcohol in the deceased's bloodstream and by refusing to permit a homicide detective to testify as an expert on this point; and
- (3) the sentence imposed was excessive.

At trial, William Brown testified that he and his wife visited the Cunningham residence about 9:00 P.M., September 29, 1967. When they arrived, they were received by Mrs. Cunningham alone because the defendant was in bed sleeping. He awakened about twenty minutes later and was in a daze, probably the result of an earlier overdose of alcohol. Shortly thereafter, Brown and the defendant went out to get something to drink. They returned with a fifth of brandy, some Champale and some beer. The two couples sat in the living room and "started drinking and playing some records." Meanwhile, Brenda Cunningham, the defendant's daughter and one of eleven children in the family, came home with her boyfriend. Mrs. Brown and Brenda then began doing a dance called the "Funky Broadway" and Mrs. Brown tried

to teach the defendant's wife how to do the dance. The defendant rudely told his wife to sit down because she was too old to be dancing. Mrs. Cunningham sat down for a short time and then she and Mrs. Brown went into the bathroom. Brenda went into an adjacent room with her boyfriend. While the ladies were gone, the defendant went into his bedroom and got his gun, a .22 caliber revolver. When the defendant came into the living room with the gun, Brown told him to put it away. According to Brown, the defendant put the gun "in his pocket and told me that something is going to happen that night." The ladies returned from the bathroom and sat for a time in the living room. About fifteen minutes later, Mrs. Cunningham again went to the bathroom and the defendant went in behind her a few minutes later. About two or three minutes passed and Brown heard a shot. Brown immediately started for the bathroom and encountered the defendant. Brown indicated that the defendant said at that time, "She made me do it." Brown looked in the bathroom and saw Mrs. Cunningham lying on the floor and also saw the defendant's gun laying between the body and the toilet. Brown took his wife and went across the street to phone the police. When he left, the defendant "was still in the washroom trying to get her up." The next day Brown saw the body of Mrs. Cunningham at the Cook County Morgue. He further indicated that on the night in question he saw Mrs. Cunningham drink one shot of brandy and about "four or five Champales."

At this point in the trial, an evidentiary stipulation established that Mrs. Cunningham died from a bullet wound of the head and, at death, her bloodstream contained "174 milligrams percent ethanol," i.e., alcohol. There was no stipulation, however, concerning the effects of that amount of alcohol upon an individual and the court advised defense counsel that he could bring in a witness to testify on the matter.

Virgie Brown, who was William Brown's wife and the deceased's sister, testified substantially the same as her husband. She indicated that she saw the defendant in the hall outside the bathroom immediately after the shooting and heard him twice say: "She made me do it." She identified the gun, which had been recovered from the shooting scene, as the defendant's, and said that she had seen him with it "thousands of times." She stated that she had never seen the deceased in possession of the weapon.

Brenda Cunningham, age 16, substantially corroborated the testimony of Mr. and Mrs. Brown. She did not, however, see her father, the defendant, in the hallway after the shooting and did not hear him say anything. She also identified the gun as being the defendant's and indicated that she had never seen her mother, the deceased, in possession of it.

Police Officer A. L. Howard testified that he recovered the gun from the shooting scene and properly inventoried it. He determined that the gun was registered to the defendant. His testimony was corroborated by Officer Albert Halper.

Detective Michael Hencke testified that he interviewed the defendant at the 10th District Police Station during the early morning hours of September 30, 1967. The detective stated that he advised the defendant of his constitutional [Miranda] rights and then "asked him if there was anything he would like to say to me." According to the detective, "He said yes he would. He told me that he was in a washroom of his apartment when his wife came in the washroom. He stated that she had a weapon in her hand and she showed him the gun, she told him that she wanted to carry a gun. . . . He said he was sitting on the toilet, he heard a shot, he looked up, she fell down. . . . He said she shot herself."

Detective Robert Wasmund testified that he was present

during the defendant's interrogation and he substantially corroborated the testimony of Detective Hencke. On cross-examination, defense counsel gave Detective Wasmund the pathological report and protocol which had been prepared by personnel of the coroner's office in conjunction with their autopsy on the deceased. Defense counsel asked Detective Wasmund how many similar reports he had examined during his tenure as a police officer. The detective replied that he had examined about ten or twelve such reports. Defense counsel then asked the following question: "And can you tell me what a reading of, analysis of the blood showed in the presence of 174 milligrams percent ethanol means"? The prosecution objected to this questioning, asserting that the witness was not a toxicologist and was unqualified to render an expert opinion as to the significance of a reading of 174 milligrams of alcohol in a person's bloodstream. The objection was sustained.

An evidentiary stipulation established that the pellet which was removed from the deceased's body during the autopsy had been fired from the gun which was recovered from the shooting scene. It was also stipulated that there is a rebuttable presumption in Illinois, under 47 U.A.R.T. Motor Vehicle Act, that a person with more than 100 milligrams of alcohol in his bloodstream who drives a motor vehicle is driving under the influence of intoxicating liquor. The defendant's age was then stipulated to be 43 years.

The State rested its case and defense counsel's motion for acquittal was denied.

The defendant took the stand on his own behalf and testified that he arrived home from work about 4:45 P.M., September 29, 1967, and told his wife that he was going out to buy some barbecue for dinner. According to the defendant, "[S]he told me to bring some beer and half a pint, so I went across the

street and got half a pint of hundred proof Old Granddad before I went to the barbecue place. So me and her drank that." The defendant stated that William and Virgie Brown came over about six or seven o'clock and "we just sat there and drank and talked and played records and it lasted on until this accident happened." He admitted being in possession of the .22 caliber revolver that night, but stated that the gun was normally carried to and from work by his wife and that he had purchased it for her to carry as protection. He had removed the gun from her purse after returning home from work that night because he was going some distance to pick up the barbecue and apparently wanted some protection.

With respect to the shooting, the defendant testified: "When I . . . went in the bathroom, my wife was in the bathroom standing there at the facebowl, washing her hair. So I told her I had to use the bathroom. I taken [sic] the gun out and laid it up on the cabinet, the medicine cabinet. . . . And when she seen the gun, she said, 'I'm going to take my gun back and put it in my purse.' . . . [I] sat on the commode, and in a few seconds the gun went off, just like that." The defendant indicated that his back was turned toward his wife when the shot was fired. He stated that he then saw his wife lean against the facebowl with her hand over her face. He went to the door and told Mrs. Brown to call the police and an ambulance. He went back into the bathroom and remained with his wife until the police arrived. He denied ever saying "She made me do it" and denied having made any statements to the police which were contrary to what he had just testified. He further stated that he had never been arrested in his life, had been married to the deceased for seventeen years before her death, had always loved her and did not shoot her on the night in question.

The defense rested and the State called Henry Stevens

in rebuttal. Stevens, who was Brenda Cunningham's boyfriend, stated that he saw the defendant go into the bathroom after his wife was already in there. He heard a loud conversation occurring in the bathroom and then heard a shot. He ran to the bathroom and saw Mrs. Cunningham lying on the floor. The defendant was leaning over the body and Stevens heard the defendant say "She made me do it." The witness also indicated that Brenda Cunningham was not present when the defendant uttered those words.

Detective Michael Hencke, who had testified earlier for the State, was called as a rebuttal witness. The detective reiterated what the defendant had told him during the interrogation after the shooting.

Defendant's first contention on appeal concerns the sufficiency of the evidence against him. He asserts that the facts give rise to a hypothesis of innocence as well as one of guilt, and argues specifically that the evidence in this case establishes that the deceased might well have committed suicide. He attempts to find weighty support for his theory in the fact that the deceased's bloodstream contained 174 milligrams percent of alcohol at the time of her death. This fact, he contends, gives rise to a presumption that the deceased was intoxicated. Because she was intoxicated, he continues, her state of mind was such that her suicide might have been a natural consequence. Defendant also refers to the rude insult to which the deceased was subjected while she was dancing in the living room with Mrs. Brown, and sums up his theory by posing a question: "Can it be said here that there is not a ground for the hypothesis that the wife in a drunken state, driven to drunken shame and hurt by the biting words 'Sit your ass down, you are too old,' took her own life? Or ground for interpreting 'She made me do it' as meaning either 'She made me say those insulting words' or 'she made me

buy her the gun."

In answer to defendant's contention, we quote the following language of People v. Huff, 29 Ill. 2d 315, 194 N.E. 2d 230 (1963):

A conviction may be based upon circumstantial evidence, and this court has held that the manner of death and the means by which it was inflicted may be inferred from the circumstances proved. The fact that the circumstantial evidence relied upon must not give rise to any reasonable hypotheses under which the defendant could be innocent of the crime charged, does not mean that the trier of fact is required to search out a series of potential explanations compatible with innocence, and elevate them to the status of a reasonable doubt.

We have carefully examined the entire record and are of the opinion that defendant's hypothesis of innocence is insufficiently established to raise a reasonable doubt under the facts of this case. Accordingly, we are satisfied that the trial court did not err in holding that there was sufficient evidence to establish the defendant's guilt beyond a reasonable doubt. See People v. Morrison, 23 Ill. 2d 201, 177 N.E. 2d 833 (1961), cert. denied, 370 U.S. 946 (1962); People v. Cardenas, 98 Ill. App. 2d 446, 240 N.E. 2d 417 (1968).

In his second contention, defendant asserts that the trial court erred by refusing to take judicial notice of the meaning of the amount of alcohol in the deceased's bloodstream. We do not agree. While a court may take judicial notice of that which everyone knows to be true, People v. Tassone, 41 Ill. 2d 7, 241 N.E. 2d 419 (1968), cert. denied, 394 U.S. 965 (1969), we do not believe that the fact in question here is a matter of common knowledge. The effect of alcohol upon all persons is not the same, Osborn v. Leuffgen, 381 Ill. 295, 45 N.E. 2d 622 (1942), and the trial judge was obviously aware of this when he refused to take judicial notice and suggested that defense counsel could introduce expert testimony on the point. Moreover, the statutory presumption of intoxication under the Motor Vehicle Act is related to the State's promotion of highway safety and, therefore, has

no application to this case.

Defendant also contends that the trial judge erred by refusing to allow Detective Wasmund to testify as an expert concerning the meaning and effect of certain quantities of alcohol in a human bloodstream. It is, however, well established that a witness must qualify by knowledge and experience in order to be competent as an expert in a particular field or on a particular subject of inquiry. Whether a witness is competent to give an expert opinion is a question of fact for the trial judge, and a matter largely within his discretion. 18 I.L.P. Evidence § 322. Under the facts here, we can find no abuse of discretion by the trial judge. Detective Wasmund was qualified during trial only as a police officer and his passing familiarity with coroner reports was clearly insufficient to render him competent as an expert in medicine.

For his final contention, defendant asserts that the sentence imposed was excessive. He asks this court to reduce his sentence pursuant to its power under Ill. Rev. Stat. (1969) ch. 110A, § 615(b), and bases his prayer for leniency on the following facts: the absence of a past criminal record; the unusual nature of the shooting, pointing as it does to drinking of alcoholic beverages as the chief cause rather than a serious motive; the many years of happy marriage with a good family life and frequent visits from relatives; the many years of faithful employment and support of his large family; and the fact that his eleven children badly need him. We note that all of these allegations are supported by the record and we find them impressive. After carefully considering these matters and the attendant circumstances of the offense, we conclude that this is a proper case for the exercise of our power to reduce the punishment imposed by the trial court. We exercise this power cautiously and recognize that ordinarily the trial judge has a superior opportunity

to determine what sentence should be imposed. All indications are that the defendant, Charles Cunningham, has a high rehabilitation potential and, as the court said in People v. Lillie, 79 Ill. App. 2d 174, 223 N.E. 2d 716 (1967): "[A]dequacy of punishment should determine the minimum sentence, with the maximum dependent on the court's divination as to the length of time required to achieve rehabilitation. . . . Excessive minimum sentences . . . may defeat the effectiveness of the parole system by making mandatory the incarceration of a prisoner long after effective rehabilitation has been accomplished."

For the reasons given, defendant's conviction is affirmed and defendant's sentence is reduced to a minimum of fourteen and a maximum of twenty years in the Illinois State Penitentiary. As modified the judgment of the Circuit Court is affirmed.

JUDGMENT MODIFIED AND AFFIRMED.

BURKE, P.J., and GOLDBERG, J., concur.

54039

132 I.A. 557

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
HARRIS GIBSON (Impleaded),	)	Hon. Mel R. Jiganti,
	)	Presiding.
Defendant-Appellant.)	

ABST.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

After a jury trial, defendant Harris Gibson was found guilty of burglary. He was sentenced to a term of 3 to 6 years. The four points raised by defendant will be considered in order. No point is raised on sufficiency of the evidence to sustain the verdict. However, for clarity and better understanding, we will first summarize the evidence.

On November 20, 1967, Jack Lavold, his wife and children lived in Des Plaines, Illinois. All members of the family left home in the morning. A neighbor, looking out of her window during early afternoon, saw two men back a station wagon into the Lavold driveway and then walk up to the rear door of the house. One of the men, identified by the witness as the defendant Gibson, remained near the rear door as a lookout. The other forcibly broke the door open with his shoulder. Photographs received in evidence reflected the damage to the door jamb. Both of the men then entered the home.

The witness summoned police, who arrived shortly. The police found defendant and the other man inside of the home and demanded that they come out. The men did so and were arrested. When Mr. and Mrs. Lavold had left their home in the morning, it was all in good order. When the police arrived, they found that everything had been removed from the bedroom drawers; clothing had been dumped on all three bedroom floors;

articles of personal property were strewn about the house; a portable television set had been removed from its place; an electric guitar had been moved; a camera and a typewriter were placed on a bed and a chest of silver had been opened. The disarray in the home was shown by photographs taken shortly after arrest of the defendant. This condition was most consistent with preparation for speedy mass removal of valuable personal property from the premises.

The next day, a young son of Mr. and Mrs. Lavold looked under the bed in his room and found two loaded pistols in holsters and a high-powered gas-operated BB gun. These weapons were immediately turned over to the police. They were not owned by any member of the Lavold family and had not been observed by them in their home prior to this incident.

The defendant was truly apprehended in flagrante delicto. He did not testify in his own behalf and did not call his convicted accomplice as a witness. He offered no defense. The evidence of guilt is indeed overwhelmingly beyond any reasonable doubt.

As background information, it should be noted that defendant refused repeated offers by the trial court of appointment of counsel. He insisted upon conducting his own defense. However, in response to the suggestions of the trial court, he did agree that the court could appoint counsel to attend the trial and advise him. The court appointed an able and experienced attorney from the office of the Public Defender who attended the trial as advisor to defendant. We will now consider the contentions of defendant raised by counsel appointed for this appeal.

The first point is the failure of the trial court to instruct the jury as to the meaning of the word "theft". One given in-

struction, defining burglary in accordance with the language of the statute, necessarily used the word "theft". (Stats. C. 38, §19-1(a). IPI--Criminal 14.05 at Page 231). The court also instructed the jury regarding the issues in proof of the crime of burglary. (IPI--Criminal 14.06, Page 232). In this latter charge, the court instructed the jury regarding the intent with which defendant entered the building and again used the word "theft". Neither defendant nor the State tendered any instruction purporting to define "theft".

Leaning heavily upon the decision of this court in *People v. Davis*, 74 Ill. App. 2d 450, defendant urges that the absence of a definition of "theft" prevented a fair trial and in effect thwarted proper administration of justice so that the verdict cannot stand. This contention must be rejected. In *Davis*, defendant was charged with attempted robbery. The jury was instructed as to the statutory definition of attempt but there was no instruction which defined the specific offense attempted. The opinion in *Davis* correctly described this type of definition as "vital to the veriest function of a jury" (74 Ill. App. 2d at page 454). The same is true in each of the decisions cited by this court in *Davis*. In all of them there was a failure to instruct the jury as to the elements of the offense in question. (*Commonwealth v. Tracey*, 137 Pa. Super. 221; 8 A.2d 622, 625; *Brook v. State*, 6 Okla. Crim. 23, 115 P. 1026, 1027; *Byrd v. United States*, 342 F.2d 939, 941; *Morris v. United States*, 156 F.2d 525 and *Screws v. United States*, 325 U. S. 91).

Neither *Davis* nor the above cited cases support this contention of defendant. In the situation at bar, the trial court properly instructed the jury in complete accordance with IPI--Criminal. The issues involved as presented by the evidence were well and clearly defined. It should be noted that IPI--Criminal

does not suggest or require that it is necessary to define "theft" in a burglary case. Such instruction is not presented. Furthermore, within the context of the evidence here, the word "theft" is a simple everyday word of common knowledge. It is defined by Webster as "the act of stealing or an unlawful taking of property." There was no issue and no evidence in the case at bar concerning any of the refined aspects or unusual situations which might conceivably be covered by the word "theft". (C. 38, §16-1).

Instructions may not be purely theoretical or abstract. They must state the applicable principles of law needed by the jury to cope with the facts presented. *Gasperik v. Simons*, 124 Ill. App. 2d 360, 364. Instructions must always conform to the evidence and to the facts. They are merely the vehicle by which pertinent principles of law are given to the jury for application to the facts. Instructions are the legal flesh and blood to envelop the skeleton of facts and the jury completes its verdict by use of both.

As an analogy, the word "building", also used in the statute and in the instructions at bar, might be susceptible of different refined shades of meaning in a particular case. See *People v. Wilson*, 24 Ill. 2d 598, 601 and cited cases. However, in the case at bar, no legal question is presented regarding the meaning of "building" within the context of the evidence. Consequently there was no need for the trial court sua sponte to instruct the jury regarding the meaning of the word "building". Identical reasoning disposes of the issue regarding "theft". We find no error in the instructions given by the trial court.

There is an additional most cogent reason for rejecting this contention. In the recent decision of *People v. Stewart*,

46 Ill. 2d 125, our Supreme Court condemned an instruction involving identification in a robbery case. But, the court affirmed the conviction because the evidence of guilt was so overwhelming "that the erroneously given instruction could not have affected the jury's decision." The court pointed out that the record showed "no basis upon which reasonable doubt might have been founded". 46 Ill. 2d at page 128. This reasoning is conclusive of the point. In the case at bar, the competent and proper evidence of guilt is so positive and overwhelming, and the absence of any type of defense is so apparent, that it would be futile and ridiculous to impanel another jury. No reasonable jury could reach any different result.

Defendant's second contention is that the admission in evidence of the various weapons found upon the burglarized premises was so prejudicial as to prevent a fair trial. Defendant argues that the BB gun in particular had little or no probative value as it was quite likely that one of the Lavold children had hidden the gun underneath the bed. This argument quite overlooks the fact that the police identified the BB gun as a high-powered gas-operated type. This court, speaking through Mr. Justice Lyons, has given consideration to this precise kind of weapon and has pointed out that it is admirably useful as a burglar's tool. *People v. Hahn*, 90 Ill. App. 2d 367, 373.

In the case at bar, these weapons and ammunition were offered as demonstrative evidence. The use of this type of evidence in this case was merely cumulative. In our view, the circumstances amply show that all of these articles were brought into the Lavold home by defendant and his accomplice and were abandoned under the bed by them when the burglary was interrupted by the police. Thus, there is ample proof to connect the two loaded pistols with defendant and the crime. *People v. Germany*,

28 Ill. 2d 154; *People v. Jones*, 22 Ill. 592, 600. In addition, the BB gun is firmly linked to the crime because it is properly classified as a burglary tool. A leading Illinois case in this connection, cited in Cleary Handbook of Illinois Evidence, §13.3 at page 228, is *People v. Panczko*, 381 Ill. 625, 633, 46 N.E.2d 28. See also *People v. Santucci*, 24 Ill. 2d 93, 100.

There is another valid consideration which requires that we reject this claim of error. We have already pointed out the overwhelming strength of the evidence of guilt. This court has recently held that even "commission of error of constitutional dimension by the trial court does not necessarily dictate that that court's judgment be reversed", *People v. Rush*, 126 Ill. App. 2d 136, 142. See also *People v. Landgham*, 122 Ill. App. 2d 9 and *People v. Smith*, 38 Ill. 2d 13. Upon this record, we cannot hold that the admission of these articles was an abuse of discretion or that their admission constituted prejudicial and reversible error. Even if admission of this evidence was error, we are impelled "to declare beyond a reasonable doubt that the error did not contribute to the finding of guilty". *People v. Smith*, 38 Ill. 2d 13, 15.

Counsel for defendant next urge that the trial court erred in instructing the defendant that, if he testified in his own behalf, he could be impeached by prior convictions. Unfortunately for this contention, it is not actually presented by the record.

The record shows that defendant's accomplice was brought into court by proper legal proceedings so that he was available as a witness. At the close of the State's case, and out of the presence of the jury, the court, upon being assured that defendant would call this accomplice as a witness, suggested that the matter

be discussed by defendant with his legal advisor. The court also advised defendant that if he himself had previously been found guilty of certain crimes, they could be introduced in evidence for the purpose of affecting his credibility if he chose to testify. At that time, before the hearing in aggravation and mitigation, the court was completely uninformed as to defendant's past criminal record. The court did not warn or instruct the defendant in any manner. The court properly advised defendant of the possibility of impeachment of defendant and of his accomplice and then suggested that the defendant discuss the matter with his legal advisor. The court then expressly asked defendant if he understood this situation and defendant responded affirmatively.

This colloquy took place on Friday, January 17, 1969, at the conclusion of the court day. The hearing was not resumed until the following Monday, January 20, at 10:30 a.m. The defendant then voluntarily refrained from testifying in his own behalf and from calling the accomplice as a witness. We are of the opinion that the trial court acted with complete propriety and with extreme care to protect all of the rights of this defendant. The statements by the trial court had no causal relation to the failure of defendant to testify in his own behalf. It is evident here that defendant did not testify, and failed to call his available accomplice, because he had no defense. Consequently, this third contention of defendant's counsel must be rejected.

The final contention is an ingenious argument based upon the constitutional and statutory right of defendant to a speedy trial. (C. 38, §103-5(a)). Counsel for defendant computed the total time attributable to defendant's own delay, being 167 days, and subtracted this from 441 days, which elapsed between arrest

and trial. Since the remainder of 274 days exceeds the statutory period of 120 days, defendant now claims that he should be discharged.

Because no motion for discharge was made before trial, this right must be deemed waived, much as it is waived in those cases where defendant himself requests the delay. Such is the clear purport of the decision in *People v. Williams*, 28 Ill. 2d 280, cited in defendant's brief. See also *People v. Kuczynski*, 33 Ill. 2d 412, 413.

However, even overlooking this decisive point, the argument falls. Whenever a defendant causes or agrees to a delay, the statutory period of 120 days is tolled and begins to run anew upon the date to which the case is continued. *People v. Hairston*, 46 Ill. 2d 348, 353; *People v. Kuczynski*, 33 Ill. 2d 412, 415; *People v. Siglar*, 127 Ill. App. 2d 256, 261; *People v. Knox*, 94 Ill. App. 2d 36, 39. It follows that defendant's right to a speedy trial was not impinged upon.

The judgment of conviction is accordingly affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J. and LYONS, J., concur.

132 I.A.² 558

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

vs.)

JOHN G. DANNO,)

Defendant-Appellant.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.Hon. L. Sheldon Brown,
Presiding.

ABST

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant, John G. Danno, has appealed from the sentence given him after his violation of probation.

On October 26, 1967, the defendant entered a plea of guilty to a charge of forgery. At his hearing in mitigation and aggravation, conducted prior to sentencing, it was established that the defendant was fifty-one years of age, married, the father of four children, employed as a real estate broker and free of prior arrests or convictions. The defendant was then sentenced to five years probation, conditioned upon his restitution of \$17,500, which was the sum he illegally obtained through the forgery. The defendant satisfactorily complied with the order of restitution.

On August 29, 1968, a warrant was issued for the defendant's arrest for violation of his probation. On January 7, 1969, a rule to show cause why defendant's probation should not be revoked was filed and a hearing on that rule to show cause was held on January 16, 1969. At the hearing, defendant stipulated to those facts which established that he had, indeed, violated his probation. The court then terminated defendant's probation as unsatisfactory. The prosecutor recommended a sentence of two to five years in the State Penitentiary while defense counsel suggested that one to three years was appropriate. The trial judge, however, sentenced the defendant to the Illinois State Penitentiary for not less than three nor more than fourteen years.

On appeal, the defendant raises two contentions.

First, he argues that he is entitled to a new hearing on his violation of probation because he entered into a stipulation of facts, which established his probation violation, on the mistaken belief that he would receive a lesser sentence.

Second, he argues that the sentence he received was excessive.

To support his first contention, defendant asserts that he was persuaded by the prosecutor to stipulate concerning the facts surrounding his probation violation in exchange for the prosecutor's recommendation of a two to five year sentence. He alleges that he would never have entered into the evidentiary stipulation had he known that the trial judge would not follow the prosecutor's recommendation. He concludes this argument by suggesting that he was deprived of his right to a fair hearing because the trial court did not advise him that the court was not bound by the prosecutor's recommendation and because the court did not inquire if he wished to persist in the evidentiary stipulation in view of the non-binding quality of the prosecutor's recommendation.

We note at the outset that the defendant was adequately represented by counsel at every stage of the proceedings here involved and defendant does not suggest that he was in any way coerced into the evidentiary stipulation concerning his probation violation. It is also clear from the record that the trial judge was not a party to any of the pre-hearing discussions between the prosecutor and the defendant or his counsel. Under these circumstances, we can find no merit in the defendant's first contention. Through his counsel, the defendant knowingly and voluntarily entered into the evidentiary stipulation at his hearing. Stipulations by counsel, as to matters of fact within the scope of their professional functions, bind their clients as

judicial admissions, and such admissions are competent evidence against a party, provided, of course, they are relevant to the issue on which they are offered. 18 I.L.P. Evidence § 136.

Had the prosecutor refused to recommend the sentence apparently agreed upon by the parties, perhaps the defendant would have cause to raise a due process argument. See McKeag v. People, 7 Ill. 2d 586, 131 N.E. 2d 517 (1956). There is, however, no allegation or evidence that the prosecutor's promise to recommend a certain sentence was unfulfilled. Moreover, the law is well settled that a mere recommendation of a sentence by counsel is in no way binding on the court. People v. Kessler, 41 Ill. 2d 501, 502, 244 N.E. 2d 142 (1969). Accordingly, we find that the defendant received both a fair and a complete hearing on his violation of probation.

For his second contention, defendant argues that the sentence imposed was excessive. He asserts that the sentence undertakes to punish him not only for the initial offense for which he was granted probation, but also for those acts which constituted his probation violation. If this assertion be true, then it must follow that the sentence imposed was indeed excessive and must be modified. Invoking punishment for violation of probation does not, in any sense, undertake to punish for the offenses committed subsequent to the granting of probation. Granting probation only defers the imposition of sentence as to the matter wherein probation was granted. People v. Morgan, 55 Ill. App. 2d 157, 204 N.E. 2d 314 (1965).

Our examination of the record in this case indicates that the trial judge was noticeably and properly disturbed by the several acts of forgery which the defendant committed in violation of his probation. We are unable, of course, to precisely determine whether the trial judge looked only to the

original offense when he imposed sentence or whether he also considered the offenses subsequently committed in violation of probation. Because there is some evidence, however, that the trial judge in his zeal to do justice might have looked beyond the original offense when he imposed sentence, we must resolve the question in the defendant's favor. In view of all of the circumstances in this case, therefore, we exercise our power under Ill. Rev. Stat. (1969) ch. 110A, §615(b), and reduce the sentence imposed to not less than two nor more than five years in the Illinois State Penitentiary. We emphasize that our decision in this regard has been made with reference only to the facts surrounding the initial offense of forgery for which the defendant was convicted and to the matter disclosed at the hearing in mitigation and aggravation conducted subsequent to that conviction.

For the reasons given, the judgment terminating defendant's probation is affirmed and defendant's sentence is reduced to a minimum of two and a maximum of five years in the Illinois State Penitentiary. As modified the judgment of the Circuit Court is affirmed.

JUDGMENT MODIFIED AND AFFIRMED.

BURKE, P.J., and GOLDBERG, J., concur.

54106

132 I.A. 570

PEOPLE OF THE STATE OF ILLINOIS,)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
MONROE DURLEY,)	
Defendant-Appellant.	)	Hon. L. Sheldon Brown,
		Presiding.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

Defendant, Monroe Durley, then 17 years old, was indicted for rape. C. 38, §11-1. After a bench trial, he was found guilty and sentenced from 4 to 12 years. Defendant contends that the trial court should have accepted his defense of alibi; that he was improperly identified and that he did not understandingly waive his right to a trial by jury.

ARST.

We will first consider defendant's final contention regarding his waiver of trial by jury. C. 38 §103-6 also C. 38 §115-1. At a preliminary call of the case, the court inquired from defendant as to whether he wished a jury or a bench trial. This took place in the presence of defendant's appointed counsel and the prosecutor. Defendant responded, "A bench." The court stated his understanding that there would be a trial by jury. Apparently the prosecutor anticipated trial by jury. However, the court agreed to a bench trial and suggested that defendant sign the jury waiver; which was done. The judge then asked defendant three questions to all of which the affirmative response of "yes" was made. That is, defendant told the court that he knew what he had signed was a jury waiver; he knew what a jury is and he did not want a jury trial but wished to be tried by the court in a bench trial. The court stated that he would accept this and the case was accordingly tried without a jury.

Defendant relies upon and quotes from People v. Sailor, 43 Ill 2d 256. That decision does not help defendant. There,

defendant's counsel, in defendant's presence and without any objection by her, waived trial by jury. The Supreme Court held the jury waiver valid and binding. In the case at bar, conversely, defendant himself waived trial by jury in the presence of his counsel and with counsel's apparent acquiescence, approval and consent. Similarly, the decision of this court in *People v. Rambo*, 123 Ill App 2d 299 does not support defendant here. As this court there carefully pointed out, the trial court did not ask defendant if he wished to waive trial by jury. "Neither the defendant nor his counsel said that a jury trial was to be waived." *People v. Rambo*, 123 Ill App 2d at page 302.

It is well established that there is no precise and definite formula with which to determine if the defendant has understandingly waived jury trial. The decision must be made from a study of the particular circumstances of each case. *People v. Luckey*, 126 Ill App 2d 15, 18; *People v. Diesel*, 128 Ill App 2d 388. We expressly reject the contention of defense counsel that the trial judge subtly sold defendant a bench trial. We treat similarly the additional contention that defendant's trial counsel was influenced in any manner by the trial court in connection with the jury waiver. The record does not justify even the assertion of these arguments.

In the case at bar, the outstanding factor is the conduct of defendant himself in stating affirmatively that he wished a bench trial and in demonstrating by his affirmative response to the questions put by the trial court that he knowingly signed a jury waiver; that he knew what a jury is; that he did not wish trial by jury and that he wished a bench trial. In this situation we find that the defendant knowingly and understandingly waived his right to trial by jury. *People v. Alexander*, 45 Ill 2d 53; *People v. Diesel*, 128 Ill App 2d 388, 392; *People v. Adorno*, 126 Ill App 2d 98 and *People v. Luckey*, 126 Ill App 2d 15.

For a proper understanding and determination of the two remaining issues regarding identification and alibi, a factual summary is essential. On November 29, 1968, the complaining witness was walking east on 73rd Street in Chicago with her two male children, 6 and 3 years old. She was holding the hand of the younger boy. They had been to visit her sister and were on their way home at approximately 11:30 p.m.

A man approached the complaining witness from the rear, seized her around her mouth and warned her not to scream or she would be killed. She noted that the man had his hand in his pocket "as though he had a gun or something." The man asked her if she had money and she responded negatively. The younger child commenced to cry. The man told the witness to release the child's hand or he would kill both of them. She promptly obeyed.

The man then pulled the complaining witness rapidly down the alley in a southerly direction. She testified that the alley was lighted and she had occasion to see the man's face at that time. He retained his hand in his pocket and told her not to scream or she would be killed. In this manner, the man took plaintiff up to and across Jeffrey Boulevard, a well lighted thoroughfare. They continued for about 100 or 125 feet to the entrance of a school yard on the opposite side of Jeffrey. Well within the school yard, at a corner of the school building, the man ordered complaining witness to remove her slacks and undergarments, which she did. She testified that she again saw the man as he was speaking to her and that she was facing him at the time. He was standing up, facing toward the lights on Jeffrey. The man then forced her to have intercourse with him, which occupied about five minutes.

The man then rose from the ground and told the witness not to dress. However, she disobeyed him and resumed her clothing. He asked her which way Euclid Avenue was but she did not respond

and he then ran east and left the playground. The complaining witness ran back toward 73rd Street and Jeffrey where, fortunately, she was able to attract the attention of a police car. The children were found in the care of some people who had taken them into a tavern. It was a cold evening with the temperature about 30 degrees. A hospital examination that evening confirmed the commission of the crime. The complaining witness also testified that the man who had accosted her was dressed in a dark jacket and dark pants and that he was wearing a dark leather ski cap trimmed around with fur.

Approximately one month later, on December 28, 1968, two police officers came to the complaining witness' home and showed her seven or eight photographs of various men. Two were fat, two were dark and others were more light complected. All of them were Negro. The complaining witness had given the police a description of her assailant as being thin and dark. Two of the men depicted in these photographs came within this general designation. The complaining witness "recognized" one of these two pictures. She testified, however, that this identification was not positive; that the man in the picture resembled her assailant but that she would prefer to identify him in person.

The defendant had been arrested shortly prior to that time in connection with a robbery case. He was to appear in court on this charge on January 10, 1969. The police took the complaining witness to the courtroom on that day. She testified that the police did not tell her the defendant's name and she did not know his name until she heard his case being called. The complaining witness testified that when she saw defendant she identified his face as being that of the man who had assaulted her. She further stated that he was then wearing the same coat, pants and ski cap as on the night of the attack. Indictment of defendant and his in-court identification followed in due course. A line-up was not used by the police.

The defendant testified in his own behalf. He admitted that he owned a ski cap and black jacket but denied that he had ever seen the complaining witness before his previous court appearance when she identified him. He categorically denied that he had raped or attacked her. He also testified that he has a scar to the side of his right cheek bone about half an inch long. This was never mentioned by the complaining witness. On cross-examination, he testified that, during the late evening hours of November 29, 1968, he was at work at 39th Street and Lake Park Avenue, in Chicago. He signed nothing when he started his work and he was working under an oral agreement. He could work or stay home as he desired; and, if he went to work, he was not required to stay for any particular time.

Defendant called James Town as an alibi witness. He has known defendant for about two years and there is no evidence that he has any relationship or particular friendship with defendant or his family beyond the circumstances of employment. This witness testified that he is employed as a mechanic in a gasoline station at 39th Street and Lake Park Avenue. He works six nights a week until 12:00 midnight, when the shift is changed. The witness also testified that he has never missed a day of work. This witness works part-time as a mechanic and records are kept of his work. These records were not produced. The witness testified that he had refreshed his recollection from the records in January of 1969 but the records had been turned over to a bookkeeper who is "not in business anymore."

The witness further testified that defendant worked for him as a helper or apprentice. He stated that defendant liked this work and that he took the time to show him. Defendant worked for him fourteen hours a day from 10 o'clock in the morning until 12 o'clock midnight. He compensated defendant at irregular intervals upon a basis of sharing in the payment for jobs as received.

However, defendant had no fixed hours and he could appear or leave as he desired.

James Town testified that defendant worked for him on this basis from about October 16, 1968, steadily until about four days before Christmas of 1968. The witness testified that defendant worked for him each and every night during this period except one day which defendant missed because of a broken tooth. He testified that they both wore coveralls during work and changed their clothes before going home together. He testified that he took defendant home every night after midnight. Defendant lived at 5525 South Wentworth Avenue, in Chicago. He further testified that defendant's mother had contacted him after defendant had been charged with the crime in the instant case. At that time, he had no independent or specific recollection of the pertinent night. He had then consulted the records of his work which showed that on the night in question, November 29, 1968, he had been installing a motor in a 1963 Chevrolet automobile. He testified that the defendant had helped him on this job. They quit work at midnight and cleaned up. Then he drove defendant home, arriving there a little before 1:00 a.m. The witness had seen defendant in a fur cap and a dark jacket. However, he did not remember the type of clothes that defendant was wearing about the time of the occurrence in question. The witness characterized his own recollection by the statement "my memory is pretty bad."

Defendant attacks the legal validity as well as the factual strength of the identification. In defendant's brief, the charge is first made that the State's attorney withheld photographic evidence. This charge is entirely unsupported by the record and must be rejected. The record in this case is clear as to the three photographs received in evidence at the trial. People's Exhibit 1 is a photograph of the entrance to the school playground. Exhibit 2 depicts the side of the school building. Exhibit 3 reflects the corner of the building where the rape took

place. These pictures were all taken by the police about 1:30 in the morning on the day immediately after the occurrence. Artificial light was used in this process. We specifically find that no evidence of any kind was withheld and that no rights of defendant were violated by the pictures in question. We note that defendant raises no point regarding the competency of these three photographs of the scene.

Defendant next makes the same contentions used in virtually every case in which identification is a factor. It is undoubtedly correct that identification of one person by another generally raises a dangerous possibility of error. It is equally correct that identification is basically the expression of "an opinion or conclusion of the identifying witness." *People v. Peck*, 358 Ill 642, 649; *People v. Washington*, 121 Ill App 2d 174, 179; *People v. Reed*, 103 Ill App 2d 342, 348.

It is also true that identification by photographs is not the ideal or even the best method of police procedure. However, practical considerations require, in many instances, that the process commence in this manner. Therefore, our courts make no inflexible ruling in this type of situation. Each case involving identification by scrutiny of photographs must be considered and decided individually, with due regard to all pertinent facts. The proper guiding principle is to determine whether or not the procedure used in examination of the photographs by the complaining witness was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *People v. Wooley*, 127 Ill App 2d 249, 254 quoting from *Simmons v. United States*, 390 U S 377, 384, 88 S Ct 967, 19 L Ed 2d 1247; *People v. Thomas*, 127 Ill App 2d 444, 454; *People v. De Savieu*, 120 Ill App 2d 45, 51. The burden rests upon defendant to prove that the procedure was so suggestive as to give rise to a very substantial likelihood of irreparable identification. *People v. Johnson*, 45 Ill 2d 38, 45. *People v. Watkins*, 46 Ill 2d 273, 278.

In the case at bar, there is no evidence that the method of selection or the use of these photographs was unduly or unfairly suggestive in any manner. In addition, there is no showing of any unfair police suggestion made to the complaining witness at the time she identified defendant prior to trial. Compare *People v. Wooley*, 127 Ill App 2d 249, 254. On the contrary, the record here shows that the complaining witness, without police suggestion, identified defendant at the time of his court appearance in the other case; that she identified him not from his clothes but from his face and that she selected him upon observing the persons present in the court room. We find that identification procedures used in the case at bar were completely fair and legally proper in every respect.

The next issue is the opportunity of the complaining witness to observe the person who assaulted her and the credibility of her testimony. The evidence here is clear that this witness had sufficient opportunity to examine her attacker so as to form a most credible basis for her identification. The person in question first accosted the complaining witness on 73rd Street in Chicago. She was there able to see him and to observe that he had his left hand in his pocket. She next traversed a lighted alley with her assailant for a distance of a short block. She crossed Jeffrey Boulevard in his company. This is a well lighted thoroughfare. She walked through the playground with him for a distance of more than 100 feet. She had conversation with him from time to time during this process. She testified that the light in the playground was fairly good and that the defendant was facing toward Jeffrey Boulevard, which was well lighted. Also, as shown by the questions put to complaining witness by the careful trial judge, she had ample opportunity to observe his features immediately before and after the act of intercourse. It must be concluded that complaining witness had an excellent opportunity for observation of the perpetrator of the crime.

Diligent counsel for defendant mount the usual attack on credibility of the complaining witness. For example, impeachment was attempted by the fact that at preliminary examination she testified that her assailant's "hair was kind of high." In court, she testified that she could not recall that specific question and answer. However, she also stated, on redirect examination by the prosecutor, that she did recall making the statement but that she was then describing how she thought defendant's hair would look from the side. The point is also raised that she did not mention the half inch scar on defendant's face. In the opinion of the court, these are slight discrepancies which do not destroy or even seriously affect the credibility of the complaining witness. In a situation of this type, "precise accuracy" would be impossible. *People v. Ruderson*, 129 Ill App 2d 271, 278; *People v. Willis*, 126 Ill App 2d 348; *People v. Jackson*, 95 Ill App 2d 28, 32. Another helpful authority here is the decision in *People v. Miller*, 30 Ill 2d 110 where the Supreme Court affirmed a conviction based upon identification even though a scar 1-1/2 inches long was not mentioned by one complaining witness and not noticed by the other.

We are particularly impressed by her repeated opportunities to observe defendant as above pointed out. In addition, upon reading the record, her testimony gives the impression of a cautious person who would not carelessly identify another. She expressly refused to commit herself solely from defendant's photograph and instead stated that she wished to see him in person before making her identification final.

Three additional circumstances, though each tenuous in itself, combine to support this identification. Clothes worn by the defendant at the time of his court room identification prior to trial were identical with the description of clothes worn by the assailant originally given to the police. Defendant agreed

in his own testimony that he had owned a black jacket and a dark ski cap with fur at the time of the occurrence. Next, when the complaining witness was first accosted by her assailant, he demanded money from her. Defendant had been arrested on a charge of robbery prior to the first exhibition of his picture to the complaining witness. Finally, in his testimony, defendant stated that he knew where Jeffrey Boulevard was but that he did not know the location of the school in question and that he had been in that area only casually in the past. The person who assaulted the complaining witness asked her where Euclid Avenue was. Upon her refusal to answer, her assailant ran from the school yard in an easterly direction. The record showed that Euclid Avenue is west of Jeffrey and therefore west of the playground in question. Apparently complaining witness' assailant also lacked specific knowledge of the area.

Upon careful examination of the entire record, we conclude that the identification of defendant by the complaining witness is positive and credible. Identification of this type has constantly and consistently been held sufficient to convict a defendant even though it is contradicted by his denial. *People v. Stringer*, 129 Ill App 2d 251, 262; *People v. Bracey*, 129 Ill App 2d 57, 62; *People v. Keller*, 128 Ill App 2d 401, 406; *People v. Mitchell*, 128 Ill App 2d 90, 96; *People v. Adorno*, 126 Ill App 2d 98; *People v. Luckey*, 126 Ill App 2d 15.

The issue for decision by the trial court and for review by this court is whether the evidence of alibi was sufficient to create a reasonable doubt. This determination must be made from the basic premise that the burden of proof never shifts to the defendant and that it was the duty and burden of the State to prove guilt beyond a reasonable doubt upon due consideration of all the evidence. *People v. Perroni*, 14 Ill 2d 581, 592, cert. den. 359 U S 1004; *People v. Wheeler*, 5 Ill 2d 474, 483; *People*

v. Moscatello, 114 Ill App 2d 16, 29; People v. Flynn, 89 Ill App 2d 328, 331. It is true that the testimony of the alibi witness is unimpeached and that he is uncontradicted except, of course, by the identification of the defendant. However, the weakness in the alibi is apparent from the fact that the records in question might show that the witness, James Town, was actually at work in the gasoline station on the night of the crime but it is conceded and agreed that there is no writing or written evidence of any kind to carry the matter one step further and to show that defendant was actually present and employed at the station on the night in question. In other words, the alibi depends solely upon the testimony or credibility of the single witness corroborated only by defendant's own testimony.

The authorities most relied upon by defendant's diligent counsel are not conclusive and not even persuasive. In People v. Magadan, 126 Ill App 2d 335, the court expressly stated that, "the identification of the defendant by the complaining witness was weak, vague and unconvincing." The court also stated that there was no independent origin for identification of the defendant other than a, "suggestive and unnecessary confrontation at the police station." 126 Ill App 2d at page 338. Quite to the contrary, the evidence of alibi was, "fully supported by several witnesses" (page 338). The testimony regarding the alibi was described as, "strong" (page 339).

In People v. Gardner, 35 Ill 2d 564, reversing 61 Ill App 2d 326, the opinion of the Supreme Court reveals a situation in which the identification was weak and the alibi was exceptionally strong. The Supreme Court expressly pointed out that, "the identification of the defendant by the complaining witness was weakened by several factors, while the defendant's alibi was positive and unimpeached" (page 571). The alibi was presented by means of the defendant's own testimony and by the testimony of two impartial and credible witnesses; further partly corroborated

by ticket stubs found in possession of the defendant at the time of arrest. The testimony of the complaining witness showed that, "defendant's alibi was not a recent concoction" (page 573). Finally, the Supreme Court pointed out additional circumstances, which we need not detail, characterized by the court with the statement that, "apart from the weakness of the identification and the strength of the defendant's alibi, there are other circumstances which militate against the defendant's guilt" (page 573).

We are completely unable to classify the case at bar in the same category as decisions of this type. In our opinion, we have before us in the instant case a positive, believable and completely unimpeached identification as contrasted to alibi evidence which is weak and patently unconvincing.

Similarly, the reliance of counsel for defendant upon the statute pertaining to alibi defense (C. 38 §114-14) is of no benefit. The statute requires the prosecuting attorney by written request to initiate procedure whereby defendant is obliged to file and serve written notice of his intention to assert an alibi. There is nothing in this entire record which shows expressly, or even by inference, that the prosecution had specific knowledge or notice before trial that defendant proposed to offer alibi testimony. Under these circumstances there was no duty upon the prosecution to investigate or to call additional witnesses. *People v. Adorno*, 126 Ill App 2d 98, 101, nor would failure of the State to call witnesses against the alibi lead to any presumption in the defendant's favor. *People v. Graham*, 127 Ill App 2d 272, 279.

Upon due consideration of all of the evidence, argument of counsel and the cited authorities, we have concluded that we cannot disturb the judgment of the initial trier of fact. We cannot say that the evidence here is so improbable as to raise a reasonable doubt of guilt. The question here on review is simply

a matter of credibility of the witnesses. The trial judge, who heard all of the evidence, had the duty of making this decision. He concluded that the alibi was not worthy of belief and we cannot say that this conclusion is erroneous or against the manifest weight of the evidence. Courts of review have expressed these principles with unanimity in many, many cases. A few of the more recent decisions of this court are *People v. Luckey*, 126 Ill App 2d 15, 30; *People v. Wright*, 126 Ill App 2d 91, 97; *People v. Holt*, 124 Ill App 2d 198, 203; *People v. Jackson*, 95 Ill App 2d 28, 32; *People v. Williams*, 84 Ill App 2d 1, 5. See also *People v. Donel*, 44 Ill 2d 280, 283 and cases there cited.

We have accordingly concluded that the judgment of the Circuit Court should be and it is affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J. and LYONS, J. concur.

54108

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
CARLOS MENDOZA,	)	Hon. Kenneth E. Wilson,
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT

ABST.

Carlos Mendoza was found guilty, following a bench trial, of the offense of unlawful possession of narcotic drug [Ill. Rev. Stat. (1967), ch. 38, §22-3]. Judgment was entered on the finding and he was sentenced to a term of not less than two years nor more than two years and one day in the Illinois State Penitentiary. The sole issue raised on appeal is whether the trial court improperly denied his motion to suppress certain physical evidence.

At the hearing on his motion to suppress, defendant testified that immediately preceding his arrest he was sitting in the driver's seat of a car parked on Chicago Avenue conversing with two friends and had been so engaged for approximately ten minutes. He was waiting for the owner of the car, Julio Colon, to return from a nearby building. Two policemen, their guns drawn, then ordered both him and his companions from the vehicle. Each of them was searched and then one of the officers conducted a search of the automobile. He found a package containing heroin under the seat.

William McNulty, a Chicago Police Officer, testified for the State. On April 30, 1968 he and his partner, Sergeant Maher, were assigned to the vice detail. At approximately 11:00 A.M., an informant who had been known to him for about one year and who had provided information on three previous occasions, resulting in three arrests (two convictions and one case pending)

entered the station. The informant advised him that he had just left the corner of Paulina and Erie Streets where one Carlos Mendoza, who had been known to the informant for sometime, had offered to sell him some heroin.

The officer and his partner placed the informant in their car and drove to within a quarter of a block of the intersection named by the informant. There they observed two men standing on the corner, one of whom was identified by the informant as Mendoza. No other persons were standing on the corner, although there were others in the area. The informant then left the car and the officers proceeded toward the corner. Mendoza then approached a car parked approximately twenty-five feet from the corner and entered on the driver's side. The officers pulled alongside before Mendoza had an opportunity to close the door.

The witness' partner alighted from the passenger side of their auto and in so doing the doors of the two cars became enmeshed. The officers announced their office and drew their revolvers. The witness exited his auto through the door left open by his partner and in so doing observed Mendoza drop a package to the ground beneath the car in which he was seated. He retrieved the package and found it to contain three smaller packets, each of which contained a white powdery substance. A field test of the powder produced a positive reaction. Finally, Officer McNulty testified that approximately fifteen minutes elapsed from the time of the conversation with the informant at the station to the arrest of defendant.

On cross-examination the officer testified that the informant was given money on occasion, the exact amount being dependent upon the size of the contingency fund at the moment. Following the defendant's arrest the informant was given five dollars.

It was stipulated that the evidence at trial would be the same as that presented at the hearing on the motion to suppress.

In support of his contention that the trial court erred in denying his motion to suppress the narcotics, defendant argues that the drugs were the fruit of an unlawful search, as there was neither a warrant for the search of the auto nor probable cause for his arrest. He argues that probable cause for his arrest was not established since the reliability of the informant was not established and that, on the contrary, lack of reliability was conclusively established by reason of proof that the informant was paid. He does not dispute the proposition that probable cause may be founded upon information received from an informant, nor does he contend that the auto could not have been searched if probable cause for arrest were established.

We do not agree with defendant's analysis of the evidence with respect to the reliability of the informant. Officer McNulty testified that the informant had supplied information on three previous occasions and that his action on the information had resulted in two convictions and one case pending. This evidence was sufficient to establish the reliability of the informant. See People v. Robinson, 105 Ill. App. 2d 57, 245 N.E. 2d 137 (1969). Thus, even if defendant's version of the finding of the contraband is accepted, it does not follow that their discovery and seizure were unlawful. The evidence was sufficient to establish probable cause for arrest. Moreover, Officer McNulty, a credible witness, testified that the drugs were in plain view, defendant having dropped them to the ground when he and his partner announced their office. Thus the trial court could have properly determined to deny the motion to suppress under either version of the discovery of the drugs. We find no error in the

trial court's determination of the issue. Accordingly, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J., concur.

PEOPLE OF THE STATE OF ILLINOIS,

1321.A. 572

Plaintiff-Appellee,

vs.

JAMES MARTELL,

Defendant-Appellant.

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY) HON. JAMES J. MEJDA
) JUDGE PRESIDING

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT

ARST.

In February of 1969, the defendant, James Martell, was convicted of burglary after a trial by jury, and he was sentenced to serve 2-10 years in the Illinois State Penitentiary. After this judgment was entered, the State filed a Rule to Show Cause why the probation on which the defendant had been placed in December, 1966, should not be terminated. As a result of the burglary conviction the probation was revoked and the defendant was sentenced to serve a 2-10 year term which would run concurrently with the sentence for burglary. The defendant appeals from the conviction and from the order revoking probation.

The defendant contends, on appeal (1) that the State invaded his constitutional right to remain silent when it pointed out in cross-examination and in closing argument that he did not explain his presence at the scene of the burglary to the police at the time of his arrest, (2) that the Court on its own motion should have instructed the jury on the elements of theft, and (3) that a probation revocation order which is induced solely by a conviction should be reversed and remanded for a new hearing when the conviction itself is reversed.

Because of the nature of the contentions advanced by the defendant, we need only briefly summarize the evidence presented at trial. Percy Moore, a retired postal employee, testified that he lived in one of the first floor apartments at 1931 South Homan Avenue and that the Hill family lived in the other first floor apartment. On September 28, 1967, at about 2:00 P. M.

he noticed some clothing, a radio, and a camera on the floor at the back door of the Hill's apartment. The glass on the back door was broken, and when he looked inside the apartment he saw someone moving. He then went to the front door and met the defendant just as the defendant was leaving the Hill's apartment. He asked what the defendant was doing and the defendant replied that he was visiting his sister. Moore told the defendant to return to Hill's apartment. As he was calling the police he heard the front door of the Hill's apartment open. He grabbed a kitchen knife, and he met the defendant. He forced the defendant into his apartment where they waited for the police to arrive. While they were waiting, he noticed that the defendant's hand was bleeding, but he had not struck or cut the defendant with the knife. The defendant offered him a bag with money in it, if he would let the defendant go.

Thomas Hill testified that he resided at 1931 South Homan Avenue with his wife and son, John. On September 28, 1967, he left the apartment at about 6:00 A. M., and when he returned at about 3:30 P. M. he found the police and Moore in his apartment. The apartment had been ransacked. A pane of glass in the back door was broken, and there were bloodstains in the kitchen, the living room, the dining room, and his son's bedroom. He testified that he never gave permission to the defendant to enter the apartment. John Hill testified that he left the apartment at about 8:00 A. M. and that when he returned from work at 5:00 P. M. he found that the apartment had been ransacked. He never gave the defendant permission to enter the apartment.

John Kanvert, a police officer, testified that he, along with two other police officers, went to 1931 South Homan Avenue where they found Percy Moore holding the defendant in Moore's apartment. He inspected the Hill's apartment which he found had been ransacked. On cross-examination he testified that he had had words with the defendant, but that he did not recall what was said. John

Karlik, another police officer, corroborated the testimony of Officer Kanvert.

The defendant testified on his own behalf and stated that he was a painter and that he went to the 1931 South Homan building on September 28, 1967, to find a man named Wilson who supposedly lived there and who in May had asked him to do some painting and decorating after Labor Day. He went to the front door, but when he did not find Wilson's name, he went to the rear. He noticed that there was a pile of clothing on the first floor landing and that a door, which had a broken pane, was slightly ajar. He called out Wilson's name and then entered the apartment. The door was ajar. He was leaving the apartment by the front door when he was stopped by Moore. He explained that he had been looking for a man named Wilson, but Moore said that no one by that name lived there and told him to get back into the apartment. He went back into the apartment and attempted to leave by the rear door, but he was stopped by Moore who cut him with a knife. When the police arrived he was in Hill's apartment and not in Moore's. He attempted to explain his presence in the apartment to the police, but the police only asked him whether he had been in trouble before. When he answered affirmatively, the police did not permit him to continue his explanation. On cross-examination, he stated that he did not tell the officers who arrived at the scene about Wilson "because they didn't want to hear what I had to say."

The defendant contends that his right to remain silent was invaded (1) when he was asked on cross-examination whether he told the policemen who arrested him the story which he had related on direct examination and (2) when in final argument the prosecutor commented that the defendant had an opportunity to tell the police about Moore's cutting him, but that the defendant did not avail himself of this opportunity. It is argued

that the questions and comments by the prosecution were designed to inform the jury that the defendant had exercised his right to remain silent while in police custody.

At trial, the defendant made no objections to the questions propounded on cross-examination or to the comments in closing argument which he contends on appeal were improper. It is well settled that unless a defendant makes a timely objection in the trial court he may not contend on appeal that evidence was erroneously admitted, People v. Dial, 95 Ill. App. 2d 345, 238 N.E. 2d 122, or that he was prejudiced by improprieties in the prosecution's closing argument. People v. Hester, 39 Ill. 2d 489, 237 N.E.2d 466. However, when a defendant contends that he has been deprived of a constitutional right, a court of review will consider the contention even though no objection was made in the trial court, and it will reverse in a proper case unless it appears that the defendant has foregone his constitutional right as a matter of trial strategy. People v. Weinstein, 35 Ill. 2d 467, 220 N.E. 2d 432, Henry V. Mississippi, 379 U.S. 443.

We do not believe on the facts of his case that the defendant was deprived of his constitutional rights. The defendant was cross-examined only on matters raised in direct examination and the statements by the prosecution in closing argument relating to the defendant's failure to explain his presence at the scene of the burglary were legitimate comments based on the evidence presented at the trial. The defendant testified on direct examination that he had attempted to explain his presence in Hill's apartment to the police when they arrived, but that the police did not permit him to give his explanation. This voluntary testimony was given for the purpose of convincing the jury that the defendant was innocent, and it raised the question of the completeness of the defendant's statement to the police at the time of his arrest. The defendant cannot now complain that he was deprived of his rights because he was cross-examined on his own

testimony or because the prosecution in closing argument commented upon and drew adverse inferences from a portion of his testimony.

This case must be distinguished from the situation presented in Fowle v. United States, 410 F.2d 48. There a defendant stood mute upon being arrested. At his trial he testified on his own behalf and was compelled on cross-examination to admit that he had not revealed his version of the fact at the time he was arrested. The Court held that the silence of an accused person chosen in the exercise of the privilege against self incrimination may not be used by the prosecution against an accused when the accused testifies at trial in his own behalf. In the case at bar, as distinguished from Fowle it was the defense and not the prosecution who brought out the fact that the defendant did not explain his version of the facts at the time of his arrest. Here the prosecution cross-examined and commented upon what was brought out by the defendant.

The trial court instructed the jury on the elements of the crime of burglary by submitting I.P.I. Criminal No. 14.06. This instruction as relevant here stated that to sustain a charge of burglary the State must prove beyond a reasonable doubt inter alia that the defendant entered a portion of a building "with the intent to commit the crime of theft." The defendant argues that the jury was improperly instructed because no additional instruction was given defining the elements of the crime of theft. We are not in accord. We initially find that the Committee Note to I.P.I. Criminal 14.06 does not direct that such additional instruction be given. The defendant did not submit an instruction defining the elements of theft. The defendant having failed to request such an instruction, cannot complain that such instruction was not given.

People v. Gratton, 28 Ill. 2d 450, 192 N.E.2d 903.

The defendant finally contends that the probation revocation order which was induced solely by the conviction for burglary should be reversed and remanded when that conviction is reversed. Since we are affirming the conviction for burglary, we also affirm the order revoking probation.

The judgments of the Circuit Court are affirmed.

AFFIRMED.

ADESKO, P. J. AND DIERINGER, J.

CONCUR.

(Abstract only)

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

Appeal from the Circuit

Court of Cook County.

LEONARD DORSEY,)

Defendant-Appellant.)

Reginald J. Holzer, J.

ABST.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

In 1967, Leonard Dorsey pleaded guilty to the theft of an automobile. He was placed on probation for five years. In 1968, he pleaded guilty to a charge of burglary and was sentenced to the penitentiary for one to three years. In 1969, his probation was revoked and he was sentenced for the automobile theft. The sentence, two to five years in the penitentiary, was to run consecutively to the term he had received in the burglary case.

Dorsey's sole assignment of error is that the consecutive sentences constitute multiple sentencing resulting in a too severe punishment.

Consecutive sentences are permissible under Illinois law. The statute provides that a court may order a term of imprisonment upon conviction for one offense to commence upon the expiration of the term of imprisonment for any other offense, as long as the convictions for the two offenses do not arise from the same conduct. Ill.Rev.Stat., 1967, ch. 38, para. 1-7(m). Since the consecutive sentence imposed upon Dorsey was authorized by this statute, only the court's discretion in ordering such a sentence may be questioned.

A fact situation similar to that in the instant case was presented in People v. Nelson, 26 Ill.2d 337, 186 N.E.2d 362 (1962). The defendant pleaded guilty to assault with intent to commit murder and was granted five years probation. Three years later he pleaded guilty to the charge of involuntary manslaughter, for which he was sentenced to a term not less than six nor more than ten years. At the hearing to show cause why his probation should not be revoked, he was sentenced on his original conviction to a term not less than five years nor more than fourteen years in the penitentiary to commence after the expiration of his sentence for involuntary manslaughter. The reviewing court stated that a trial court may impose consecutive sentences where the accused has committed separate and distinct violations of the law and that its discretion would not be interfered with unless it appeared that the discretion had been abused and the accused prejudiced. The reviewing court found no abuse of discretion.

In People v. Smith, 105 Ill.App.2d 14, 254 N.E.2d 13 (1969), this court considered the contention that the sentence imposed upon the defendant for violation of probation was excessive. We did not reduce the seven to fifteen-year sentence, although the original period of probation was three years. The sentence was found not to be an abuse of judicial discretion.

The reviewing court should use its authority to reduce sentences (Supreme Court Rule 615(b)(4)) with caution and circumspection. If the penalty decided upon by the trial court is within statutory limits, it should not be changed merely because of judicial

clemency, or because the reviewing court might have imposed a different sentence if it had been in the trial court's position. People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673 (1965); People v. Sanford, 100 Ill.App.2d 101, 241 N.E.2d 485 (1968); People v. Valentine, 60 Ill.App.2d 339, 208 N.E.2d 595 (1965). The principal reason for the authority to reduce sentences is to prevent arbitrary or oppressive treatment of offenders, and to secure penalties which are proportionate to the circumstances of the case. People v. Wallace, 117 Ill.App.2d 426, 254 N.E.2d 643 (1969). In the present case the discretion of the trial court was properly exercised and there is no reason to reduce the sentence imposed.

The judgment will be affirmed.

Affirmed.

McNamara, P.J., and Schwartz, J., concur.

132 I.A.² 597

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 CHARLES COOK,)
)
 Defendant-Appellant.)

APPEAL FROM THE CIRCUIT
 COURT OF COOK COUNTY.

Hon. James D. Crosson,
 Presiding.

ABST.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

Defendant, Charles Cook, indicted for robbery (C 38 §18-1), was found guilty by a jury and sentenced to a term of 5 to 15 years. No point is raised on the sufficiency of the evidence. However, consideration of the issues requires a factual summary.

The complaining witness, Christine Glasgow, testified that at approximately 7:00 a.m. on the morning of October 21, 1968, she was going to work. She descended from the elevated at North Avenue and Damen Street in Chicago and walked one block south to Pierce Street. She then turned west on Pierce, walking toward Hoyne. When she reached the corner of Hoyne and Pierce, one of two men that she had noticed standing there grabbed her purse, knocked her down and fled.

The men ran south on Hoyne Avenue for approximately half a block and then turned east into an alley. The complaining witness gave pursuit. She noticed a police car travelling north on Hoyne Avenue which turned into the alley and followed the two men. She in turn followed the police car. About half a block down the alley, she saw the police car stopped and defendant in custody. She told the police officers that defendant was the man who robbed her.

The evidence also showed that a lady named Mrs. Pankiewicz had been riding in the police car and was present at the time. She pointed out Miss Glasgow's purse, which had been discarded

near a stairway. All of her property, including identification papers, was found intact in the purse.

Another lady, whose name appears only as "Mrs. Pankiewicz," testified that she was on her way to work on the same morning. She was a passenger in the police car going north on Hoyne Avenue. She saw two men about 75 feet away running south on Hoyne. The men ran into an alley going east and the police car followed. Half a block down the alley the police stopped their car. The witness saw defendant run behind a porch and saw him throw a purse under the stairs. The police took defendant into custody and stood him up against the car. The complaining witness then appeared and Mrs. Pankiewicz told her about the purse under the stairs.

Defendant, Charles Cook, testified in his own behalf. He stated that on the morning of October 21, 1968 he left his girl friend's home and was on the way to work. His girl friend lived at 1329 North Western Avenue, shortly north of Potomac. Defendant walked east on Potomac, as he was employed at the Superior Tank Company at 1242 West Division Street. Defendant further testified that the alley in question was a deadend and that he entered there only to urinate. He denied that he had stolen Miss Glasgow's purse.

Unfortunately for defendant's veracity, the record also shows that the alley is just south of Pierce Street on the east side of Hoyne Avenue and it is about 2-1/2 blocks north of Potomac Avenue. Defendant's place of employment on Division Street, is one block south of Potomac Avenue. His presence in the alley would thus require a detour of some 2-1/2 blocks in the opposite direction from his destination. Defendant's reason for his presence in the alley is also difficult to reconcile with his testimony that his friend had a bathroom in her home which he used, before he left, to wash his face and brush his teeth.

Defendant's diligent counsel do not question the sufficiency of the evidence to prove guilt beyond reasonable doubt. They contend that defendant was denied a fair trial because evidence of a second robbery was introduced; that he was denied due process of law when the trial court refused to allow him to present his own theory of defense to the jury and that a fair trial was denied when the prosecution presented evidence of defendant's prior conviction for robbery.

The first contention arises from the testimony of Mrs. Pankiewicz. Defendant argues that her evidence, together with statements made in closing by the State's attorney, was in effect a disclosure to the jury that defendant had committed another crime involving Mrs. Pankiewicz. This is criticized as denial of a fair trial because of introduction of evidence of an unrelated robbery. The second contention, completely to the contrary, is based upon a complaint raised by defendant himself that he should have been permitted to bring out all the facts with reference to Mrs. Pankiewicz and the previous offense. This rests upon defendant's own theory that it would have been impossible for him to commit both crimes.

Mere statement of these two contentions shows that they are not only inconsistent but repugnant. The coupling of these two contentions in defendant's brief approaches, unintentionally we are sure, an exercise in sophistry. This is purely an attempt to impale the administration of justice on either horn of a dilemma. However, fortunately for justice, the significance of both horns disappears upon analysis.

Before Mrs. Pankiewicz was called to the stand, actually before any testimony was taken, out of the presence of the jury, the prosecutor informed the court and defense counsel that he planned to call Mrs. Pankiewicz but that he would abstain from bringing out any evidence regarding the crime allegedly committed against her by defendant. The prosecutor cautioned defense

counsel against bringing out evidence of the other offense. Counsel for defendant agreed and stated that he would cross-examine the witness with that in mind. Actually, defendant was indicted for both crimes but the State elected to proceed in the instant case.

Consequently, not only was there a failure of defendant to object to the testimony of Mrs. Pankiewicz but there was, in effect, a stipulation that her testimony be given in the form that it actually was. Citation of authority is hardly required in support of the axiomatic proposition that a timely objection to evidence must be made at the trial and that objections of this type cannot be raised for the first time in this court. *People v. Eubank*, 46 Ill 2d 383, 388; *People v. Moore*, 42 Ill 2d 73, 80; *People v. Harris*, 33 Ill 2d 389; *People v. Ridener*, 129 Ill App 2d 105, 107 and *People v. Davis*, 126 Ill App 2d 114, 117.

We have carefully reviewed the excerpts from the prosecutor's closing argument which are depended upon as being prejudicial because allegedly disclosing to the jury that Mrs. Pankiewicz had previously been robbed. In this regard, we agree with the State's contention that the arguments did not directly or by necessary inference advise the jury that defendant was accused of robbing Mrs. Pankiewicz. Her presence at the scene might well have been the result of a number of other and completely different factual situations.

However, for complete destruction of this first horn of the dilemma, we also note that no error can possibly be predicated upon the testimony of Mrs. Pankiewicz. Two cases cited by defendant do not assist his argument. *People v. Gregory*, 22 Ill 2d 601, involves a written confession which contained general references to commission of prior crimes. *People v. Cage*, 34 Ill 2d 530, involves testimony of four merchants who testified that defendants, charged with armed robbery, had been present

in their stores on specific occasions other than the one involved. In our opinion, the language in *People v. Cage*, 34 Ill 2d 530 at page 533, to the effect that evidence of other crimes by an accused is proper in "placing a defendant in proximity to the time and place, aiding or establishing identity, or tending to prove design," is indeed applicable to this case in support of the State's position. It has long been the law in this jurisdiction that evidence of other offenses may be introduced if it tends to identify the accused as the person who committed the crime under investigation even though it may also involve proof of a separate offense. *People v. Harris*, 46 Ill 2d 395, 399; *People v. Wilson*, 46 Ill 2d 376, 380; *People v. Dewey*, 42 Ill. 2d 148, 157 and *People v. Van Riper*, 127 Ill App 2d 394, 399. In the case at bar, the presence of Mrs. Pankiewicz and her subsequent testimony was blended and interwoven with the charge on trial. Her testimony was properly received from every legal point of view and in conformity with every principle of basic fairness.

Considering next the second contention of defendant, the record shows that Mrs. Pankiewicz was ably cross-examined by counsel for defendant on Friday, February 14, 1969. After this, the cause was adjourned to Monday, February 17, 1969. On that day, the State concluded its testimony and defendant testified in his own behalf and rested. The State offered as rebuttal evidence certified proof of the previous conviction of defendant for armed robbery. Then, out of the presence of the jury, defendant himself told the court and the prosecutor that he wished his counsel to bring out the fact that defendant was also accused of robbing Mrs. Pankiewicz. Defense counsel stated that he himself would prefer to try the indictments one at a time. Defendant told the court that he was neither Superman nor invisible, that he could not rob two persons at the same time. This was apparently his own, original theory of the benefit that he would obtain in showing that he had committed the other robbery. The court cautioned the defendant and advised him that

what he wanted might be reversible error. The court then stated that he would proceed to conclude the case and that was the end of the discussion.

Thus, the record does not show what steps or procedure the defendant had in mind in the desire as expressed by his counsel that the attorney should "go into why Mrs. Pankiewicz was in the police car." By agreement of counsel, for the benefit of defendant, this issue was carefully avoided on cross-examination of this witness. The defendant, in his own testimony, with equal caution, avoided mention of what had previously occurred between himself and Mrs. Pankiewicz. In fact, defendant testified that he had merely walked from his girl friend's home to the alley. In this manner, he denied that he had robbed the complaining witness and in effect denied that he had ever seen or had contact with Mrs. Pankiewicz. No request was made to recall Mrs. Pankiewicz for additional cross-examination and no suggestion was made that defendant wished to take the stand again to testify why Mrs. Pankiewicz was present. Since defendant and Mrs. Pankiewicz were the only witnesses who could competently testify to the reason for her presence, it would therefore appear that this contention of defendant is an empty gesture without factual basis.

Here, again, the authorities cited by defendant's counsel are not applicable. In *Dearinger v. United States*, 344 F2d 309, defendant claimed that his counsel was incompetent. In the instant case, defendant made no such claim until after verdict and sentence. The trial court expressly rejected this claim with the statement that it was then raised for the first time and that, in the court's opinion, "the lawyer did a very good job." On the contrary, regarding his own legal ability, defendant said in a commendable display of candor, "I don't have any knowledge of the trickerlation of law." In *Dearinger*, defendant had three witnesses whom he wished to call. These witnesses were available

without delay and counsel had not refused to call and examine them. The trial court intervened and refused to call the witnesses. That decision bears no relation to the case at bar.

Brookhart v. Janis, 384 U S 1, involves an entirely different aspect of the law. The Supreme Court there held that counsel of record has no power to override the expressed wishes and desire of his client and to waive the constitutional right to plead not guilty and to have a true adversary trial which would include confrontation and cross-examination of witnesses. It follows that this second contention of defendant has no factual support in the record and no legal support in the authorities cited by his counsel. In other words, analysis shows that this second horn of the dilemma is simply nonexistent.

Defense counsel finally complains that the trial court overruled his objection and permitted impeachment of defendant by certified proof of defendant's conviction for robbery in 1957. Defendant depends upon *People v. Montgomery*, 111 2d , Docket No. 42403, which is the latest expression of the Supreme Court of Illinois upon this problem. In that case, defendant was found guilty of unlawful sale of a narcotic drug. The conviction was reversed because the trial court had received in evidence certified proof of conviction of the defendant for robbery in 1947. This was 21 years before commission of the offense charged and defendant at that time was 18 years of age. The Supreme Court reversed the conviction and established new guidelines for use of certified proof of former convictions for impeachment of a defendant.

However, the opinion and ruling are expressly limited to subsequently tried cases. The case at bar was tried before a jury in February of 1969; approximately one year prior to the decision in *Montgomery*. Consequently the *Montgomery* limitations upon use of certified proof of prior convictions for impeachment are not applicable here. Accordingly, we reject defendant's contention in this regard.

We find that this defendant had an absolutely fair trial before an able judge and a fair jury. He was represented throughout the proceedings by diligent and capable counsel. The competent evidence of his guilt is so overpowering as to eliminate any and all reasonable doubt. The judgment and sentence must be affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J. and LYONS, J. concur.

PEOPLE OF THE STATE OF ILLINOIS,)
 Plaintiff-Appellee,)

vs.)

SAMUEL JOHNSON,)
 Defendant-Appellant.)

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

HON. JACQUES F. HEILINGOETTER,
 Presiding.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the crime of burglary and was sentenced to a term of one year to four years in the penitentiary. On appeal, he contends that he was not proven guilty beyond all reasonable doubt.

ABST.

Mrs. Velma Clark testified for the People that at about 1:30 P.M. on November 30, 1967 she was in front of her home at 146 West 66th Street in Chicago when she noticed the figures of three individuals inside an apartment two doors away, at 134 West 66th Street. Mrs. Clark testified that she observed the figures through the front windows of the apartment, and that she knew that the persons who occupied that apartment were customarily at work at that time of day. The witness testified that after the figures had vanished from the windows, they came down the front steps of the apartment building and that she then was able "to identify who was who." The defendant was identified by Mrs. Clark as one of the three individuals; he was carrying a bundle in his arms, consisting of a blanket made into a pack. The other two individuals were carrying a shopping bag and a bedspread.

Mrs. Clark testified that she recognized the defendant because he was a friend of her nephew and had been to her home on several occasions in the past. She testified that after observing the three men exit the building at 134 West 66th Street, she proceeded to her own apartment and telephoned the police. Shortly thereafter

a uniformed police officer called on her and asked her several questions among which was whether she would be able to identify the defendant, to which she responded in the affirmative. The officer stated that the Police Department had not received a formal complaint of a burglary on the premises in question. The officer also stated to Mrs. Clark, "If we need you...."

Mrs. Adella Smith testified for the People that on November 30, 1967 she and her husband occupied the first floor apartment of the building located at 134 West 66th Street. She testified that she left the premises for work about 7:00 A.M. on the day in question, and that when she arrived home about 4:00 P.M. she observed that the front door to the apartment had been broken open and upon entering the apartment she observed the contents of drawers, and the like, strewn about the apartment floor. She testified that a bedspread and a wristwatch were missing from the apartment. The police were then notified. It also appears from the record that the second floor apartment of the building had been forcibly entered on the day in question.

Police Officer Raymond Rubino testified that he was assigned to investigate the burglary and that pursuant to a description given to him by Mrs. Clark, and with the assistance of the party who occupied the second floor apartment, he arrested the defendant in a pool hall in the neighborhood. The officer also testified, on cross-examination, that the police report made by the first officer who investigated the matter, pursuant to Mrs. Clark's telephone call, did not reflect either the name or the description of the defendant.

For the defense, Mrs. Adella Smith, her husband Walter Smith, and Mrs. Clark were called as witnesses.

Mrs. Smith testified that she, Mrs. Clark and the second floor tenant of the Smith building went to court together concerning the matter in December 1967; and that she and Mrs. Clark had not conversed concerning the incident prior to appearing in court. Mr. Smith testified that Mrs. Clark was a neighbor who lived two doors away from the Smith residence, and that he was not present when Mrs. Clark identified any person as being involved in the burglary.

Mrs. Clark testified that the police officer who initially responded to her call asked several questions, including whether she would be able to identify the defendant, but she did not know whether the officer wrote down the information given by her. She also testified that she spoke to Mrs. Smith on the evening of the incident and that Mrs. Smith thanked her for coming to the apartment, but the witness was not certain that Mrs. Smith realized she was there because Mrs. Smith was trying to straighten up the apartment.

Mrs. Clark was specifically found by the trial judge to have been a credible witness; from a review of the evidence in the record, the determination of the trial judge does not appear to be against the manifest weight of the evidence, which is necessary before a court of review will interfere with that determination. People v. Donel, 44 Ill. 2d 280.

Mrs. Clark, who knew the defendant personally through her nephew, testified that she observed the shadows, or figures, of three persons through the front windows of the Smith apartment about 1:30 P.M. on November 30, 1967. Her suspicions were aroused by the fact that she knew the Smiths were normally at work at that time of day. She further testified that "when the shadows disappeared from the windows, they came down the steps" and that "I

saw three heights of individuals, and when they came down the steps I could identify who was who." The witness further stated that the defendant was carrying a blanket rolled up into a bundle, and that the other two men were carrying a shopping bag and a bedspread. Mrs. Clark testified that she recognized defendant as a friend of her nephew and that defendant had been to her apartment on past occasions. After the defendant and his companions exited the premises they left the vicinity by jumping a fence.

Mrs. Clark's testimony is also corroborated by the evidence given by the Smiths that a bedspread had been taken from the apartment and also by the evidence that the second floor apartment of the Smith building was burglarized that same day, accounting for the items being carried by the defendant and his companions other than the items testified to by the Smiths. From the evidence the trier of fact could reasonably have found the defendant guilty of the burglary of the Smith apartment. *People v. Davis*, 118 Ill. App. 2d 93, 99.

The fact that the initial police report did not contain the name of the defendant, although Mrs. Clark testified that she gave the officer the defendant's name, does not render her testimony incredible as defendant maintains. Mrs. Clark stated that the officer told her that the Police Department, as of the time Mrs. Clark's telephone call was received, had received no formal complaint of a burglary on the premises in question; the officer further stated to Mrs. Clark, "If we need you...." Whether the officer wrote down the information given by the witness was a question for the trier of fact, especially in light of the fact that the trial judge specifically noted that Mrs. Clark "impressed the Court as somebody who

just seems to have been frustrated by police procedure in reporting something she saw." Further, the defendant did not call the initial investigating police officer as a witness, although he was granted several days continuance to locate the officer, after the People had rested its case.

Defendant's contention that he would not be likely to commit an offense in a locality where he was known has no merit. Experience has shown the contrary to be true. (See People v. Williams, 118 Ill. App. 2d 341; People v. Hampton, 103 Ill. App. 2d 57.)

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
NAMORE SMITH,	)	Hon. Louis A. Wexler,
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

ABST.

The defendant, Namore Smith, was charged with armed robbery in violation of Ill. Rev. Stat. (1967), ch. 38, § 18-2. Following a bench trial, the defendant was found guilty and was sentenced to the Illinois State Penitentiary for not less than four nor more than eight years.

On appeal, the defendant contends that the evidence was not sufficient to prove him guilty of armed robbery beyond a reasonable doubt.

At trial, the State presented three witnesses. The first, Andre M. Ball, testified that he was the owner of a tavern [Andre's Playgirl Lounge] at 4314 South Cottage, Chicago, and was working as the bartender shortly after midnight on October 11, 1968. There were some twenty or thirty patrons in the tavern at that time. Ball observed the defendant and two companions enter the establishment and, according to Ball, the defendant "told everybody to get out, get out, they were closing." The defendant had a weapon in his hand when he ordered everyone to leave the premises. All of the patrons except one, named "Crazy Horse" vacated the tavern. The defendant then told "Crazy Horse" "to get out if he didn't want him [the defendant] to shoot him." The defendant fired a shot into the ceiling and "Crazy Horse" ran out. Ball next stated that "Namore [the defendant] walked up and he said, 'Give me your money out of the cash register and give me two fifths of whiskey.' I said, 'Oh, you're

crazy.' And he said, 'No, I'm not kidding you.' I took the money [approximately \$150.00] out of the register and put it on the bar, and put two fifths of whiskey in a bag . . . on the bar." The defendant did not pick up the currency or the whiskey but "walked to the back of the bar and about that time the policemen arrived and they walked in." The defendant "broke and run" but first "gave the gun to London [a companion] and London threw it behind the juke box." The police searched the premises for the defendant and found him hiding above the false ceiling over the bar. The police instructed the defendant to put his hands over his head and come out, whereupon the defendant fell through the ceiling to the floor and was apprehended.

Marshall Lorenzen, a Chicago Police Officer, testified that he and his partner, Officer Frank Johns, were directed to the tavern on the night in question by an unidentified person. When the officers entered the tavern, Lorenzen saw Ball standing behind the bar. The defendant and two other men were present and the officer also observed "a brown bag and what appeared to be the cash register drawer" on the bar. Ball informed the officers that he was being robbed. The defendant glanced at the police and ran to the rear of the tavern. The defendant's companions were immediately searched and Lorenzen then conducted a search of the premises and found the defendant hiding in an area above the false ceiling over the bar. The defendant was directed to come out and, after taking one or two steps, fell through the ceiling and was apprehended by Officer Johns.

Officer Frank Johns testified that he recovered a .22 caliber revolver from behind the juke box in the tavern. The weapon had "five shells in the chambers and one shell in the chamber that had been fired." Johns first saw the defendant when he "fell through a false ceiling onto a railing and onto the floor of the tavern."



The defendant's age was stipulated to be 21 years and the State rested its case. Defendant's motion for a directed verdict was denied and the defense called Stanley Armstrong as its first witness.

Armstrong testified that he was a long-time friend of the defendant and that he visited the tavern about 9:00 P.M. on the night in question. He was sitting with Josh London when he saw the defendant enter about 10:00 P.M. The defendant said something to him about a coat and then began arguing with "Crazy Horse" about the coat. The defendant and "Crazy Horse" began to wrestle a bit and the defendant then fired a shot at the ceiling. "Crazy Horse" ran from the premises. According to Armstrong, the defendant spoke to Andre Ball, the bartender, about the coat and Ball told the defendant to "come on in the back." The defendant was holding a gun in his hand at this time. A few moments later the police arrived. Armstrong stated that he then noticed for the first time that there was money and whiskey on the bar. He did not see the defendant flee from the scene but, after he had been taken into custody by the police, did see the defendant fall through the ceiling. Armstrong further indicated that he had thrown the gun behind the juke box when the police arrived but stated that he had removed it from the bar before throwing it.

Testifying on his own behalf, the defendant stated that he entered the tavern about 9:45 P.M. and was carrying a weapon at the time. He saw "Crazy Horse" standing near the juke box and went over to "Crazy Horse" to inquire about his coat. Apparently one of "Crazy Horse's" friends had taken the defendant's coat and the defendant wanted it returned. According to the defendant, "Crazy Horse" then "told me to get out of his face. I told him, 'Let's take it outside.' He say he wasn't coming outside and then he grabbed me and we started wrestling and then I shot up in the ceiling." "Crazy Horse" then ran out of the tavern. The defendant



indicated that he next spoke to Andre Ball, the bartender, about the coat. He still had the gun in his hand at this time. When the police arrived, he laid the gun on the bar and ran to the rear of the tavern where he hid above the false ceiling. After the police discovered him and told him to come out, he fell through the ceiling and was arrested. He further testified that he never asked Andre Ball to give him money or whiskey. Moreover, he stated that he did not see any money or whiskey on the bar until after his arrest and, at that time, he saw only the bottles of whiskey on the bar; he saw no money.

The thrust of defendant's contention on appeal is two-fold: first, he contends that the evidence was insufficient to prove him guilty of armed robbery because there was no actual taking of any property; second, he argues that he was not proven guilty beyond a reasonable doubt because of improbabilities and incredibilities in the State's evidence.

Under the Illinois Criminal Code, a person commits armed robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force while armed with a dangerous weapon. Ill. Rev. Stat., ch. 38, §§ 18-1, 18-2. Defendant asserts that the evidence in this case does not support his conviction because the defendant never acquired possession of any property, and, conversely, the victim never lost possession. We are unable to agree with defendant's position in this regard. Possession by a taker need not be actual to satisfy the requirements of the criminal statute here involved. Possession is that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all others. Black's Law Dictionary 1325 (4th ed. 1951). It is clear that this definition embodies constructive as well as actual, physical possession. Our Supreme Court has also indicated this conclusion in another context. See People v.

Matthews, 18 Ill. 2d 164, 171, 163 N.E. 2d 469, 472 (1959). Under the facts of the instant case, we believe that the defendant did actually take the property of Andre Ball though defendant's possession after the taking was constructive only. The defendant, while armed with a deadly weapon, forced Ball to relinquish possession of the money and whiskey. Once Ball put his property on the bar, his possession of that property was effectively lost. He was no longer in a position to exercise his power over that property at his pleasure to the exclusion of all others. Instead, it was the defendant who could do as he pleased with the property. The defendant chose to leave the property on the bar for a time, but this did not render his possession imperfect. Under the law, the defendant went into full and complete possession of the property when he acquired the exclusive power to control it. The fact that he did not touch the property or pick it up is of no significance insofar as his possession was concerned. Accordingly, we hold that there was an actual taking of Ball's property by the defendant in this case. Thus, there was sufficient evidence to establish each element of the offense of armed robbery.

As to the second contention, it is a well established rule that in a nonjury trial it is the responsibility of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial judge will not be disturbed by a reviewing court. People v. Bracey, 129 Ill. App. 2d 57, 262 N.E. 2d 748 (1970). We have carefully reviewed all of the evidence in this case and find it sufficient to support a guilty verdict beyond a reasonable doubt. For the reasons given, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and GOLDBERG, J., concur.

132 I.A.² 674

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

vs.)

WILLIE L. JOHNSON,)

Defendant-Appellant.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.Hon. L. Sheldon Brown,
Presiding.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

This appeal involves only the sentence given defendant, Willie L. Johnson, upon termination of probation. Defendant was first charged with attempt robbery. On December 6, 1967, he pleaded guilty. The court sentenced him to 5 years probation with the first 90 days in the County Jail. Because of prior incarceration, this first period was considered served. According to the stipulation of the parties, on October 22, 1966, defendant stabbed the complaining witness and took his wallet. Fortunately, these wounds required only first aid. At that time, the State's attorney recommended a sentence of 1 to 3 years in the penitentiary. Defendant was then 24 years old, without previous criminal record.

On June 12, 1969, a hearing was held regarding termination of probation. Defendant was represented by the Public Defender. At that time, it appeared that defendant accosted a fellow passenger on a bus and attempted forcibly to obtain possession of his camera. When the victim resisted, defendant struck him with such force that the nose of the complaining witness was broken. After a jury trial, defendant was found not guilty of attempt robbery but guilty of aggravated battery. He was sentenced to the penitentiary for a term of 6 to 8 years. We are advised on oral argument that this subsequent conviction is now being appealed.



The court found that the terms of defendant's probation had been violated by his subsequent conviction of aggravated battery. The State recommended a sentence of 7 to 14 years in the penitentiary. The court sentenced the defendant to a term of 7 to 14 years. The single issue raised by defendant is that the trial court sentenced him for the subsequent conviction rather than for the original offense and that the sentence was unduly severe.

The pertinent statute provides that upon determination that a condition of probation has been violated "the court may alter the conditions of probation or imprison the probationer for a term not to exceed the maximum penalty for the offense of which the probationer was convicted." C. 38, §117-3(d). The penalty for robbery is an indeterminate sentence of from 1 to 20 years. C. 38, §18-1. The penalty for attempt robbery is the same as robbery except that the maximum is 14 years. C. 38, §8-4(c)(2). Consequently, upon termination of this probation, the trial court was empowered to sentence the defendant for an indeterminate sentence of from 1 to 14 years.

The Supreme Court and this court have had occasion many times to consider the standards which should be followed in determining whether sentence should be reduced. This court has power to "reduce the punishment imposed by the trial court." Supreme Court Rule 615(b)(4), 43 Ill 2d Rule 615. But, this court may exercise this power only with considerable caution in a proper case where the penalty constitutes a great departure from the spirit and purpose of fundamental law. *People v. Eubank*, 46 Ill 2d 383, 394; *People v. Taylor*, 33 Ill 2d 417, 424. This court has held that the power to reduce punishment should be exercised only when it is "manifest from the record that the sentence is excessive and not justified by any reasonable view which might be taken from the record." *People v. Glasgow*, 126 Ill App 2d 82, 90.

However, a new and different factor presents itself here. We are not dealing with an original sentence imposed immediately upon conviction but with a sentence imposed upon that conviction only after termination of probation and pursuant to the statutory mandate. The language of the statute does not authorize that a probationer be sentenced for acts of delinquency which he committed and which constitute the cause for termination of his probation, but only for the crime for which he was originally convicted. This distinction has been carefully and properly made by Mr. Justice Leighton, speaking for this court, in a recent opinion. *People v. Livingston*, 117 Ill App 2d 189, 192.

Working from these principles as a basic premise and applying them to the case at bar, the issue is the propriety of the sentence imposed by the court for commission of the original offense and not the subsequent conduct of the probationer which was properly considered as the cause for termination of probation. When defendant was first convicted, he was 24 years of age and was apparently a proper subject for probation. The trial court rejected the recommendation of the State's attorney for a sentence of 1 to 3 years. But, less than one year later, the court sentenced defendant to a term of years with maximum of the greatest penalty which could be inflicted for attempt and the minimum seven times greater than the minimum punishment for attempt. Presumably the State's attorney as representative of the People would not recommend any sentence less severe than that required by all the facts and circumstances. The sentence imposed, however, is much more severe than the original recommendation and is in conformity with the second recommendation made by the State's attorney after the subsequent conviction.

In our opinion, all of these circumstances considered together demonstrate that the sentence was imposed for the acts



which caused termination of probation rather than for the crime for which defendant was originally convicted. The sentence was patently of undue severity. Under these circumstances, however reluctantly, we are constrained to exercise our power to reduce the sentence. Accordingly the judgment for termination of probation will be affirmed but the sentence will be reduced from the imposed term of 7 to 14 years to a term of a minimum of 2 years and a maximum of 8 years.

Judgment modified and, as modified, affirmed.

JUDGMENT MODIFIED.

BURKE, P. J. and LYONS, J. concur.

54479)
54490)

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)
vs.)
EUGENE ADAMS and LESTER COOPER,)
Defendants-Appellants.)

1321A² 700
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

HON. ROBERT J. COLLINS,
Presiding

ABST.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendants were found guilty at a bench trial of the crimes of armed robbery and aggravated battery. Each defendant was sentenced to a term of five years to fifteen years in the penitentiary on the armed robbery charge and to a term of one year to five years on the aggravated battery count, the sentences to run concurrently. They appeal.

The complaining witness, Charles Humes, testified that about 4:00 A.M. on October 31, 1968 he was returning home after a night of drinking and socializing, when he met a man named Carey "Lucky" Smith at 51st Street and the Chicago Transit Authority elevated train station in Chicago. Smith had previously promised to sell Humes a .25 caliber automatic pistol for \$25, and as the two men stood and conversed concerning the purchase, a police car drove by and the two separated.

A few minutes later Humes rejoined Smith, who was then standing among a group of seven or eight men, and Humes asked Smith whether or not he was going to sell the gun. One of the men with whom Smith was standing placed a gun to Humes' head and demanded everything he had, but Humes told the man that he could get his possessions if the man killed him. Humes then walked away from the group.

Humes testified that as he was walking back to 51st Street he heard a gunshot. The witness testified that he ran to the

elevated station to learn what had happened, where he saw a man named "Anderson," one of the group which had attempted to rob him earlier, trying to sell a sweater for train fare. Humes attempted to engage Anderson in a fight, but Anderson's female companion told them to take the fight outside the station. Humes thereupon gave up his efforts and continued his walk home.

As Humes approached the corner of 51st Street and Prairie Avenue, near his home, he noticed defendants Adams and Cooper following about 15 feet behind him. He then observed a man named "Chuck" approach from across the street and ask Adams if "this is the one," to which Adams replied in the affirmative. The witness testified that as he turned to face Adams, Chuck fired two shots from a gun inside his pocket, striking Humes on the upper left side of the body and on the left hip. Humes testified that he knew both Adams and Cooper prior to the incident; they frequented a tavern near Humes' home and had, on occasions in the past, asked Humes for money with which to buy alcohol. The witness stated that Adams was also known to him as "Shotgun."

After the shooting Humes ran to a nearby doorway where he attempted to secure help from a resident, but no one answered his call for help. When Humes turned around in the doorway Adams and Cooper were upon him. Adams was holding a .25 caliber pistol in his hand and the two men took \$215 from the witness which was a portion of the witness' wages received the day before from his employment as a bricklayer.

Humes then walked a short distance to where he thought a police vehicle would be located, flagged down a patrol wagon and was taken to a nearby hospital for treatment. As Humes was being treated for his wounds Anderson was brought into the hospital for treatment of a hand wound and Humes pointed him out to the police officers as one of the men involved in the robbery.

Humes, Anderson and several police officers went to an apparently abandoned apartment building in the 5000 block of Calumet Avenue where nine men, including defendants, were pointed out by Humes as having been involved in the robbery. All nine were placed under arrest and transported to police headquarters.

On cross-examination, Humes' account of the incidents on the morning in question remained substantially the same. In addition Humes testified that the bullets which struck him did not enter his body, but merely grazed him.

Chicago Police Officer Sullivan testified that he accompanied other police officers and Humes and Anderson to an apartment building in the 5000 block of Calumet Avenue where nine men were placed under arrest after Humes identified them as being involved in the robbery. He further stated that Humes did not specify Adams and Cooper at that time. He also related that Anderson told the officers where those involved in the robbery could be located.

Chicago Police Officer Harrison testified that the apartment in question was searched after the complaining witness identified the group and that a sawed-off rifle and a .25 caliber automatic pistol were found, the latter weapon being under a radiator in one of the bedrooms. The pistol was received into evidence over objection and was identified by Humes as being similar to the weapon held on him by Adams during the robbery. The money taken from Humes was never recovered.

The defendants offered no evidence in their behalf.

Defendants first contend that the testimony of the People's principal witness was contradictory, incomprehensible and improbable, and that for that reason defendants were not proven guilty beyond a reasonable doubt. We disagree.

Although the record does reveal that the testimony of the complaining witness, Charles Humes, was at times rambling and somewhat difficult to follow, the trial court nonetheless made a summary of the People's evidence after final arguments of counsel and specifically stated that Humes was a credible and believable witness. The record reveals that counsel on both sides had difficulty understanding the complaining witness due to the courtroom acoustics and the witness' dialect.

Humes testified that he was proceeding to his home in the early morning of October 31, 1968 when he met Smith who had previously promised to sell him a pistol. The two men conversed and parted company, and shortly thereafter Humes again joined Smith who was then in the company of seven or eight other men. After Humes questioned Smith concerning the purchase, one of the other men in the group held a gun to Smith's head and demanded his possessions. Humes then walked away from the group, heard a gunshot, and was about to return when he saw Anderson, who was with the group that had just attempted to rob him, in the elevated station. After attempting to draw Anderson into a fight, Humes again left for his home when he was accosted by the defendants and a third man named "Chuck." Humes was identified by Adams in response to Chuck's question, whereupon he was shot by Chuck. After Humes attempted to escape, Adams and Cooper robbed him at gunpoint.

One of the police officers assigned to investigate the shooting testified that when Humes was being treated at the hospital he pointed out Anderson as one of his assailants after Anderson was also brought to the hospital for treatment. Anderson then led the officers and Humes to the apartment where the defendants and others were placed under arrest and the weapon used to rob Humes was located and seized. In light of these circumstances the finding of guilty as

to both charges by the trier of fact, who had the opportunity to listen to and to observe the witnesses and their demeanor at trial, was not against the manifest weight of the evidence. See *People v. Donel*, 44 Ill. 2d 280; *People v. Nicholls*, 42 Ill. 2d 91.

Defendants attack Humes' testimony on several specific grounds. They initially point to the testimony given by him at a grand jury hearing in the matter, wherein Humes allegedly testified that Smith told Humes during their conversation on the street, "man, you can't date this one, but I'll get you one." At trial the question was asked of Humes if Smith was attempting to secure a woman for Humes, which Humes denied, stating that Smith did not say "date this one" but stated "take this one." As the trial court noted Humes' statement obviously related to the sale of the pistol.

Defendants also point to the same grand jury testimony wherein Humes stated that he "got a cab at 51st and Prairie and I was standing on the corner," whereas at trial he testified that he walked to 51st Street and Prairie Avenue. Humes explained at trial that he did not take a cab to that corner, but that he stood on the corner and spoke with a cab driver named "Eddie" and that he never entered the cab. These were matters of weight and credibility for resolution by the trier of fact.

Defendants also point to the testimony of Humes that he attempted, without apparent reason and without explanation, to engage Anderson in a fight, and further that Smith was attempting to sell Humes a pistol on the street at 4:00 in the morning as being absurdities reflecting on Humes' credibility. Humes testified that he wished to engage Anderson in a fight at the elevated station because Anderson, just moments before, had attempted to rob him (consistent with the testimony of one of the police officers as to what Humes told him at the hospital), and he further testified that Smith,

prior to the morning in question, had promised to sell him the weapon. These too were matters for resolution by the trier of fact.

The cases cited by the defendants in support of their position in this regard are clearly inapposite on their facts from the circumstances involved here. (See *People v. Rucker*, 84 Ill. App. 2d 237; *People v. Coulson*, 13 Ill. 2d 290.)

That the People did not call as witnesses "Chuck," the person who shot Humes, nor any of the persons who were arrested with the defendants in the apartment, in no way reflects upon the weight or merit of the People's case; the People are not required to call all available witnesses. *People v. Sustak*, 15 Ill. 2d 115, 122.

Defendants next contend that the trial court erred in admitting the pistol into evidence since it was obtained as a result of a search of the premises which was too broad in scope, constituting an unlawful search and seizure. They cite *Chimel v. California*, 395 U.S. 752, and *People v. Machroli*, 44 Ill. 2d 222.

The search of the premises and the seizure of the pistol in the instant matter occurred prior to the *Chimel* decision. *Chimel* consequently has no effect here. In *People v. Johnson*, 45 Ill. 2d 283, 288-290, the court stated that the search there involved, if it had occurred after the *Chimel* case, would have been illegal as being too broad in scope, but that since the search occurred before the *Chimel* decision, the legality and reasonableness of the search would have to be governed by pre-*Chimel* law. The search was upheld.

The legality and reasonableness of the search and seizure in question must therefore be judged in the light of the attendant circumstances. As were the facts in the *Johnson* case, the defendants here were arrested in the apparently abandoned apartment and the

arresting officers knew that a weapon was involved in the commission of the crimes. Not only was it reasonable to search the premises for the gun used in the commission of the armed robbery, but also for the fruits of the crime.

The Machroli case, cited by defendants, does not control the legality of the instant search and seizure. In Machroli the arresting police officer entered defendant's apartment on a breach of the peace complaint and placed defendant under arrest. Defendant at the time was clad only in his under shorts. Defendant's wife handed defendant's trousers to the officer who in turn handed them to the defendant. Defendant removed a small box from one of the trouser's pockets and placed the box on a dresser in the bedroom. (The defendant testified that the officer searched the trousers before giving them to him, which the officer denied.) The defendant and the officer left the room, and the officer thereafter returned and took the box which was later determined to contain a narcotic drug. The Machroli case clearly shows that the item taken by the officer had no relationship to the offense for which the defendant was arrested. Here, on the other hand, the weapon was used in the robbery, the officers knew a weapon was involved and it is a logical conclusion that they were apprehensive for their own safety.

The final point raised by the defendants is that the trial court erred in sentencing them on both the charges of aggravated battery and armed robbery, since both offenses arose out of the same transaction.

The record reveals that no attempt was made to rob Humes at the time that Chuck ascertained his identity from Adams and Cooper. Chuck merely requested of Adams and Cooper, "is this him," and upon

receiving an affirmative reply, shot Humes twice by means of a gun concealed in his pocket. Humes thereupon fled the scene in an attempt to secure help, and shortly Adams and Cooper were upon him and robbed him at gunpoint. It is clear that two separate crimes were committed in which both defendants took part.

For these reasons the judgments are affirmed.

JUDGMENTS AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

54563

132 I.A.² 722

JAMES KARNAZES,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
VOLKSWAGEN OF AMERICA, INC., and	)	Honorable David A. Canel,
LOOP IMPORT MOTORS, INC.,	)	Presiding.
)	
Defendants-Appellees.)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

ABST.

This is an action for damages for personal injuries alleged to have been sustained by James Karnazes as the result of an automobile accident. Volkswagen of America, Inc., as manufacturer, and Loop Import Motors, as seller of the vehicle which plaintiff was driving at the time of the occurrence, were named as parties defendants. The cause was dismissed with prejudice for plaintiff's failure to attend a pretrial conference. His petition to vacate the order of dismissal, made within thirty days of the entry of said order was denied, and this appeal followed. The only issue raised on appeal is whether the trial court abused its discretion in either entering the order of dismissal in the first instance or denying the petition to vacate.

The record reveals that an order was entered on June 16, 1969, setting the matter for pretrial on August 6, 1969, and requiring that the plaintiff, his attorney, counsel for the defendants and a representative of defendants' insurer appear. The summer assignment of cases set for pretrial procedure in the Circuit Court of Cook County is made with reference to the insurance company or insurance companies involved, in order to facilitate and expedite the handling of the pretrial call. Each pretrial judge is assigned all the cases of one insurance company for pretrial purposes. This case involved two insurance companies and was therefore assigned to two judges. On the appointed date,

all persons so directed, save plaintiff, appeared. The court entered an order dismissing the cause, with prejudice, in which it was noted that plaintiff's counsel had advised the court that he had telephoned plaintiff's home on the previous evening and spoken to plaintiff's wife, directing her that plaintiff's presence would be required. The order further noted that the court was informed that counsel for plaintiff had again attempted to contact plaintiff on the morning of the conference by calling his home, again speaking to plaintiff's wife in his absence, and that she informed counsel that she would advise plaintiff of the conference.

Thereafter plaintiff filed a verified petition to vacate the order of dismissal which, so far as the record shows, informed the court for the first time of the following additional facts. The instant cause had been up for pretrial before another judge on July 8, 1969, July 15, 1969 and July 29, 1969, on his summer pretrial calendar due to the presence of the second insurance company involved in this law suit. On the last date defendants' offer of settlement was refused by plaintiff and the cause returned to the trial call. The verified petition also contained averments to the effect that defendants had given no indication that they intended to increase their offer between July 29, 1969 and August 6, 1969, and that plaintiff's employment required him to be in northern Cook County on the latter date. Although each of the defendants filed an answer to plaintiff's petition to vacate, neither denied the allegations of fact contained therein.

We are of the opinion that the denial of plaintiff's motion to vacate the order of dismissal in the light of the unchallenged allegations of fact contained therein was an abuse of discretion requiring reversal. While we make no specific finding with respect to the question of whether the entry of the order

of dismissal was itself an abuse of discretion, we note that the apparent overriding reason for plaintiff's failure to appear on August 6, 1969, was counsel's failure to attempt to contact and inform him that his presence was required prior to the evening immediately preceding the conference. The dismissal of plaintiff's cause under such circumstances would seem to amount to the imposition of an unreasonably harsh sanction on plaintiff. However, our decision is not founded upon that consideration alone. The additional facts that the cause had been up for pretrial on three previous occasions before another pretrial judge within a month prior to the entry of the order of dismissal, without progress, and plaintiff's unavailability through an apparently reasonable excuse also contributes heavily to the decision we have reached.

This court is aware of the value of the viability of the pretrial procedures which have been established in the Circuit Court and the need to preserve the integrity of those procedures. However, where, as here, the cause may be submitted for determination on its merits with no demonstrable prejudice to the defendants, plaintiff should not be deprived of his day in court. Federenko v. Builders Plumbing Supplies, Inc., 123 Ill. App. 2d 129, 260 N.E. 2d 41 (1970). Accordingly, the judgment of the Circuit Court is reversed and the cause remanded with directions that it be reinstated in its proper place on the trial call.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J. and GOLDBERG, J., concur.

132 I.A.² 766

PEOPLE OF THE STATE OF ILLINOIS,)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
TOMMY WALKER (Impleaded),	)	Hon. Reginald J. Holzer,
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT

ABST.

The principal matter involved in this appeal is severity of sentence after termination of probation. Defendant, Tommy Walker, pleaded guilty to arson. The court sentenced him to 5 years of probation with the first year to be spent in the County Jail. Before this, in 1962, defendant had been found guilty of theft and had been placed upon probation for 1 year with the first year to be served in the House of Correction. On October 31, 1968, before another judge, defendant was convicted of possession of marijuana and was admitted to probation for 3 years.

On December 3, 1968, after a hearing, the court terminated probation on the first offense of arson and sentenced defendant to a term from 7 to 14 years in the penitentiary. This was the term recommended by the assistant State's attorney. Defendant was 22 years of age when he pleaded guilty to arson. The petition for termination of probation alleged that defendant had failed to report to the probation authorities. However, in imposing the sentence appealed from, the trial court stated that he would disregard this element in the case because defendant had been in the custody of United States Army for some time during the commencement of his probationary period.

Before considering the principal issue, we note defendant's claim that the prosecution failed to sustain the burden of proof that defendant violated his probation granted on the arson conviction. The record shows that an informal hearing was held before the court. The sole ground considered for termination of probation was conviction of defendant for possession of marijuana on October 31, 1968. This information was conveyed to the court by means of a statement by the State's attorney. An assistant Public Defender representing defendant also stated that defendant had been admitted to probation for 3 years in the case involving possession of marijuana. No objection of any kind was made to the statement of the State's attorney. No request for other proof was made. In the opinion of the court, this was tantamount to a stipulation of facts by counsel thus eliminating the need for more formal proof.

If the statements of counsel to the court cannot be relied upon or treated as a binding stipulation, it still follows that the proof was sufficient because timely objection to evidence must be made at the trial and cannot be raised for the first time at the Appellate level. *People v. Eubank*, 46 Ill 2d 383, 388; *People v. Moore*, 42 Ill 2d 73; *People v. Harris*, 33 Ill 2d 389; *People v. Ridener*, 129 Ill App 2d 105, 107 and *People v. Davis*, 126 Ill App 2d 114, 117. An appellant waives every point not raised in the trial court. *Shaw v. Lorenz*, 42 Ill 2d 246; *People v. Irwin*, 32 Ill 2d 441, 443; *People v. Shoemaker*, 87 Ill App 2d 1, 3.

Furthermore, if timely objection had been made, the files and judgment entered in the marijuana case would readily have been made available. A contention of this type is better left unstated. It is patently contrary to law, proper procedure and sound reasoning.

The second point raised by defendant, and the only issue of substance here, is the question of severity of the sentence. In

this aspect of the case, we agree with the basic principle of law advanced in behalf of defendant. Defendant cites the decision of this court in *People v. Livingston*, 117 Ill App 2d 189. We are fully aware of the valid principles there set forth by Mr. Justice Leighton of this court. It is true that the probationer "may be sentenced for the crime of which he was convicted, not for the acts of delinquency which may or may not justify revocation of probation." *People v. Livingston*, 117 Ill App 2d 189, 192. However, the problem lies in application of this theory to the practicalities of the instant case. Defendant first argues that the offense for possession of marijuana has been reduced from a felony to a misdemeanor. That statement is correct but we cannot reason from this premise that the sentence here involved is excessive. In short, we find nothing in this record to show that the trial judge sentenced defendant because of his subsequent conviction. On the contrary, the record shows only that the sentence was imposed because of the seriousness of the first offense.

We find a considerable degree of justification in imposition of the sentence appealed from. It is true that defendant was 22 years of age when the offense was committed. It is also true that he apparently served one year in jail in connection with his original crime, together with some additional time in the custody of Army authorities. However, we cannot overlook the fact that, in 1962, defendant was placed on probation for theft and the crime of arson was committed some four years later. The record also shows, in an uncontradicted statement made by the State's attorney, that this was an aggravated case of arson consisting of the fire bombing of a store occupied also as living premises of an elderly man. We have no further information or facts in this record which would constitute any basis for disagreement with or even criticism of the sentence imposed.

It is true that this court has power to reduce the sentence imposed by the trial court, Supreme Court Rule 615(b)(4), 43 Ill 2d Rule 615(b)(4). However, this power may be exercised only with "considerable caution and circumspection" and then only in a proper case. People v. Taylor, 33 Ill 2d 417, 424. The principle has also been announced by this court that the power to reduce sentence will not be exercised unless it is, "manifest from the record that the sentence is excessive and not justified by any reasonable view which might be taken from the record." People v. Glasgow, 126 Ill App 2d 82, 90. We have carefully reviewed the authorities gathered and cited in defendant's brief. In each of them, without exception, there was some cogent reason or combination of reasons evident from the record which impelled the reviewing court to reduce the sentence. Unfortunately for defendant's contentions, the record here is bare of any element which might lead to a similar result. Consequently, we have no alternative but to affirm the judgment and sentence as entered. The judgment and sentence are affirmed.

JUDGMENT AND SENTENCE AFFIRMED.

BURKE, P. J. and LYONS, J. concur.

54761

132 I.A.² 770

CITY OF CHICAGO HEIGHTS,)
a Municipal corporation,)
)
Plaintiff-Appellee,)
)
vs.)
)
LARRY J. DESAUTELS,)
)
Defendant-Appellant.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

Hon. Ronald J. Crane,
Presiding.

ABST.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered by the court, without a jury, in favor of plaintiff for \$870.00. Appearance in this court has been filed by plaintiff's counsel but no brief has ever been filed in behalf of plaintiff-appellee. On November 9, 1970, on motion of defendant, we granted leave to submit the case on the abstract of record and the brief and argument in behalf of defendant. Presentation of the issues by plaintiff municipality would have assisted this court. However, despite this unfortunate and uncommendable lack of cooperation, we will decide this appeal on the merits. *Lynch v. Wolverine Ins. Co.*, 126 Ill App 2d 192; *Daley v. Jack's Tivoli Lounge*, 118 Ill App 2d 264. Factors which have previously impelled us to pro forma action are absent here. See *Gibraltar Corp. v. Flobudd Antiques*, 111 App 2d (#54628).

A brief factual summary is required. On the issue of liability, plaintiff called defendant for adverse examination. Defendant's testimony is unimpeached and uncontradicted. Defendant was driving east in the eastbound center or inner lane on Route 30 in the City of Chicago Heights. It was raining and the street was wet. The street is a four lane highway running east and west. The speed limit is 40 miles per hour. It was then approximately 2:30 a.m. Defendant also testified that it was raining, he had the windshield wipers operating and lights on and visibility was "good."

As defendant approached the intersection of Donovan Street, which runs north and south, a white station wagon, pulling a trailer and proceeding west on Route 30, made a sudden left turn directly in front of defendant's car. In an effort to avoid collision, defendant swerved sharply to the left. This brought him into the inner westbound lane of Route 30. Defendant's car had barely cleared the rear of the trailer when he observed another vehicle approaching west on Route 30 in the outside lane. Defendant then immediately swerved to the right to avoid a head-on collision.

As a result of these maneuvers, defendant's car spun out of control then struck and severed a light pole on the shoulder of the road. At the point of contact, defendant's car was traveling backwards. Defendant also testified that he did not apply his brakes at any time throughout this episode. The light pole was located about 300 feet from the point at which defendant initially swerved to avoid the car and trailer.

Marcy Compton testified for plaintiff that she was driving west on Route 30 in the righthand or outside lane. She stated that the car pulling the trailer had proceeded directly across traffic to move across the street from one parking lot to another. She observed defendant's vehicle traveling east. She was proceeding at the same rate of speed, approximately 40 miles per hour. She verified defendant's testimony that, as the car and trailer pulled in front of his vehicle, he swerved into the inner westbound lane of Route 30. She took evasive action by turning as far as she could to the right. Defendant's car barely missed the rear of the trailer and then swerved back into the eastbound inner lane. At that time, defendant's car went out of control. The evidence regarding damages will be considered later.

The trial court found defendant guilty of negligence on the theories that defendant failed to apply his brakes and that he operated his vehicle at excess speed for prevailing conditions. Defendant urges strongly here that plaintiff failed to prove that defendant was negligent. Defendant advances the valid and acceptable proposition that the mere occurrence of the mishap does not, by itself, constitute proof of negligence. Defendant cites and relies upon the opinion of this court in *Lukasik v. Hajdas*, 104 Ill App 2d 1. There, defendant was the only occurrence witness. His testimony showed that while driving his automobile at a speed of about 10 miles per hour, immediately after leaving a parking place, and being in the exercise of due care, he was suddenly faced with an unforeseen emergency which required immediate action and which resulted in a collision with a parked car. The conclusion there was properly reached that there was no proof that defendant violated his duty of due care but that, on the contrary, "he observed the standard of ordinary care." 104 Ill App 2d at page 5.

However, in the case at bar, defendant's own testimony is quite ample to support and justify the finding of negligence. The failure of defendant to apply his brakes at any time might well be deemed a negligent omission. Furthermore, the very fact that defendant was unable to control his vehicle indicates the possibility that excess speed was the proximate cause of the mishap. In addition, defendant's own testimony shows that he violated the applicable provisions of the Illinois Vehicle Code. Defendant testified that he was driving at the speed limit; but, the statute expressly provides that this, "does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection. . .or when such hazard exists . . .by reason of weather or highway conditions." C 95-1/2 §11-601(a). The situation disclosed by the evidence here is far

different from those cases in which the evidence shows solely and only that an automobile left the traveled portion of the highway and struck a motionless object. See *Gulf Railway v. Edwards*, 108 Ill App 2d 295. It is virtually axiomatic that the existence of negligence and the establishment of proximate cause are generally issues of fact. *Walsh v. Dream Builders, Inc.*, 129 Ill App 2d 280, 290; *Bolander v. Gypsum Engineering, Inc.*, 87 Ill App 2d 325, 329. These factual issues were decided by the trial judge and it is our duty to accept his findings unless they are manifestly against the weight of the evidence. *Schulenberg v. Signatrol, Inc.*, 37 Ill 2d 352, 356 and cases there cited. Under these circumstances, the finding of negligence should not and will not be disturbed.

As regards the issue of damages, a city employee from the Bureau of Electricity testified simply that a new pole, a mercury vapor light, a new foundation and electrical conductors were necessary. He also testified that the cost of erection of the new street light was \$870.00 and he presented a paid bill for this item which the court received in evidence. Defendant specifically objected to the failure of plaintiff to adduce proper evidence of damages. The court overruled this objection and entered judgment in the amount of \$870.00. We disagree with the assessment of damages.

The proper measure of damages for destruction of personal property is its value or reasonable worth at the time and place of such destruction. *New York Railroad v. American Transit Lines*, 408 Ill 336, 339; *Freberg v. Coronet Ins. Co.*, 96 Ill App 2d 39, 44; *Central Nat. Bank & Trust Co. v. Central Ill. Light Co.*, 65 Ill App 2d 287, 290. This record is bare of evidence regarding the market value of the original post and light at the time and place of its destruction. There is no evidence as to whether the post and appurtenances had salvage value immediately after

the occurrence. The pertinent notes in IPI 30.14 and 30.15 clearly set forth the proper measure of damages in these types of situations.

We reverse the judgment against defendant and remand the cause to the Circuit Court for a new trial on damages only.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR NEW TRIAL ON
DAMAGES ONLY.

BURKE, P. J. and LYONS, J. concur.

132 I.A.² 782

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Plaintiff-Appellee,)	
)	CIRCUIT COURT,
vs.)	
)	COOK COUNTY.
WILBUR WRIGHT,)	
Defendant-Appellant.)	HON. FRANCIS T. DELANEY,
	PRESIDING.

ABST

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Indictment Numbers 67-3234 and 67-3235 charged the defendant with the commission of two offenses of armed robbery on the dates of August 17, 1967 and August 25, 1967, respectively. Indictment Number 67-3235 was tried before Judge Delaney on September 16, 1969, at which time the defendant entered a general plea of guilty. Defendant was thereupon found guilty as charged in Indictment Number 67-3235 and was sentenced to a term of four years to six years in the penitentiary. Indictment Number 67-3234 was tried before Judge Romiti on October 10, 1969, at which time defendant again entered a general plea of guilty. Defendant was then found guilty as charged in Indictment Number 67-3234 and was sentenced to a term of four to six years in the penitentiary. (The sentences in both cases were made to run concurrently with sentences imposed upon defendant in other, unrelated cases.) Both judgments of conviction in Indictment Numbers 67-3234 and 67-3235 have been appealed to this Court under the single General Number 54829.

The Public Defender of Cook County, who was appointed as defendant's appellate counsel on the appeal of both judgments, has filed in this Court a petition for leave to withdraw as appellate counsel as to the judgment in Indictment Number 67-3235 entered by Judge Delaney, on the grounds that an appeal as to that judgment would be wholly frivolous and without merit. Pursuant to the requirements set out in the case of *Anders v. California*, 386 U.S. 738, the

Public Defender has also filed a brief and argument in support of that petition raising the one issue which, after a review of the entire record in the Indictment Number 67-3235 appeal, was believed might conceivably serve as the basis of an appeal: "Whether the court fully admonished the defendant as to the significance and consequences of his change of plea from not guilty to guilty?"

This Court thereafter notified the defendant of the pending petition and granted him leave to file points in support of the appeal. Defendant has not responded.

Examination of the entire record in the Indictment Number 67-3235 appeal by this Court, as required by the Anders decision, discloses no arguable points other than raised by the Public Defender.

The following colloquy took place between the defendant, his counsel and the court regarding defendant's change of plea from not guilty to guilty:

THE COURT: What is your fellow's name?

DEFENSE COUNSEL: Wright.

PROSECUTOR: Wilbur Wright. Wilbur Wright stands before the Court in Indictment No. 67-3235. Earlier this morning the case was called and passed for the conference with the Court, the State and the attorney. At this time the case is recalled.

DEFENSE COUNSEL: Your Honor, I have had a conference with my defendant Wilbur Wright. In case 67-3235 Mr. Wright has advised me he wishes to withdraw his plea heretofore entered of not guilty, is that correct, Mr. Wright?

DEFENDANT: That is correct.

DEFENSE COUNSEL: All right. And you wish to enter another plea other than not guilty?

DEFENDANT: Yes.

DEFENSE COUNSEL: What is that plea?

DEFENDANT: Guilty.

DEFENSE COUNSEL: All right. And you realize in entering this particular plea you will be waiving your right to trial by jury?

DEFENDANT: That is correct.

DEFENSE COUNSEL: And you are submitting yourself to trial by this Court?

DEFENDANT: Yes.

DEFENSE COUNSEL: By his Honor. And you are — want this case to be tried by the Court and not by a jury?

DEFENDANT: Yes.

DEFENSE COUNSEL: Under those circumstances you realize also that by waiving your right — by entering a plea of not guilty you are also waiving certain substantial constitutional rights — by entering a plea of guilty you are waiving certain constitutional rights?

DEFENDANT: Yes.

DEFENSE COUNSEL: And you still want to enter a plea of guilty, is that correct?

DEFENDANT: That is correct.

THE COURT: Mr. Wright, you have heard your attorney...advise me at this time you are changing your plea of not guilty to this indictment charging you with armed robbery and you are now pleading guilty to this indictment which charges you with armed robbery. Is that correct, sir?

DEFENDANT: Yes, sir, that is correct.

THE COURT: Do you know that when you plead guilty you automatically waive your right to a trial by me, anybody sitting in my place in stead, twelve people in that jury box, in other words, you get no trial whatsoever, do you understand?

DEFENDANT: Yes, sir.

THE COURT: You know that?

DEFENDANT: I understand that.

THE COURT: Knowing and understand (sic) that do you still persist in your guilty plea?

DEFENDANT: Yes, sir.

THE COURT: Before accepting your plea it is my duty to advise you that on your plea of guilty to this indictment charging you with armed robbery I may sentence to the Illinois State Penitentiary for not less than two years and for as long as the rest of your natural life. Do you understand that, sir?

DEFENDANT: Yes, sir.

THE COURT: Knowing and understanding that do you still persist in your guilty plea?

DEFENDANT: Yes, sir.

The foregoing excerpts from the report of proceedings on the Indictment Number 67-3235 appeal clearly reveal that the defendant was fully admonished as to the nature and consequences of his plea of guilty, both by his own counsel and by the trial court, and that he understood what his plea entailed. The requirements of the statute and case law of Illinois governing the entry of a plea of guilty have been met. (See Ill. Rev. Stat. 1969, Chap. 38, Para. 115-2; S. Ct. Rule 401(b); People v. Kontopoulos, 26 Ill. 2d 388.)

From all the circumstances disclosed by the record in the Indictment Number 67-3235 appeal we conclude that the appeal is frivolous and without merit. The Public Defender of Cook County is granted leave to withdraw as appellate counsel in the appeal from the Indictment Number 67-3235 judgment of conviction entered by Judge Delaney and that judgment is affirmed. The appeal from the Indictment Number 67-3234 stands.

PETITION IN APPEAL FROM INDICTMENT
NUMBER 67-3235 JUDGMENT ALLOWED.
INDICTMENT NUMBER 67-3235
JUDGMENT AFFIRMED.

LYONS AND GOLDBERG, JJ., concur.

No. 54834

132 I.A. 2 786

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
PAUL RYAN,	)	HONORABLE
	)	FELIX M. BUOSCIO,
Defendant-Appellant.	)	PRESIDING.

ABST.

MR. JUSTICE MCGLOON DELIVERED THE OPINION OF THE COURT.

Defendant, Paul Ryan, was charged by indictment with the offense of armed robbery. At his arraignment a plea of not guilty was entered. When the case was called for trial, however, the defendant chose to change his plea, and pleaded guilty to the indictment. The guilty plea was accepted by the court, and the defendant was sentenced to a term of not less than two nor more than five years in the State Penitentiary. The defendant has appealed.

The Public Defender was appointed by the court to represent defendant on this appeal. He has moved for permission to withdraw as attorney of record and file such motion pursuant to Anders v. California, 386 U.S. 738. Notice of that motion was mailed to defendant on October 5, 1970. Defendant has not responded.

A plea of guilty, voluntarily and understandingly entered, waives all non-jurisdictional defects. People v. Scott, 29 Ill. 2d 429, 194 N.E. 2d 197.

It is incumbent on the court before accepting a plea of guilty to inform the defendant of the consequences of his plea and the maximum penalty which may by law be imposed upon him. 1969 Ill. Rev. Stat., Ch. 38, §115-2. It is also necessary that the proceedings in open court must establish that the defendant understands his rights and also the nature of the charge against him. Supreme Court Rule 401(b) 1969 Ill. Rev. Stat., Ch. 110A, §401(b). In this case the court had the following colloquy with the defendant after it had been informed that the defendant wished to withdraw his plea of not guilty and to plead guilty to the charges:

THE COURT: Mr. Paul Ryan?

THE DEFENDANT: Yes, sir.

THE COURT: Your attorney, Mr. Giannis, informs the Court that you wish now to withdraw your plea of not guilty to the indictment in this case returned by the January, 1969 Grand Jury, wherein you are charged with having, on September 9, 1968, at and within the County of Cook, the State of Illinois, committed the offense of armed robbery in that you with the use of force and while armed with a dangerous weapon, took \$219 in United States Currency and in wallet from the person and presence of Bernard Gotkin in violation of Chapter 38, Section 18-2, of the Illinois Revised Statutes of 1967, and you wish to enter a plea of guilty to said indictment and said charge, is that correct?

THE DEFENDANT: I am, sir.

THE COURT: You understand that on your plea of not guilty, you're entitled to a jury trial.

THE DEFENDANT: Yes, sir.

THE COURT: But on a plea of guilty, you automatically waive your right to a jury trial and your matter is submitted to this Court for a determination without a jury. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I must warn you, you also indicated that you know that you're waiving a jury trial by signing the usual form of jury waiver, is that correct?

THE DEFENDANT: Right.

THE COURT: I must also warn you and advise you that on your plea of guilty to the charge as set forth in this indictment, the Court may sentence you to imprisonment in the Illinois Penitentiary for a term of years not less than two years, but any number of years from two years up. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, it can be any number of years that the Court sees fit, but in no event will the sentence be less than two years. You understand that.

THE DEFENDANT: Yes, sir.

THE COURT: Knowing that, do you still wish to plead guilty to the charge set forth in this indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Let the record show that the defendant, Paul Ryan, has been warned and advised of the consequences of his plea of guilty and of the penalties that the Court may impose upon him on his plea of guilty to the indictment and charge of armed robbery in the case and after having so advised and warned the defendant, Paul Ryan, the defendant persists in his plea of guilty and the charge in the indictment therein, the charge stated in the indictment in this case.

Therefore, the Court will accept the plea of guilty and enter a finding of guilty of armed robbery as set forth in the indictment.

The record shows beyond peradventure that the Court fully informed the defendant of the consequences of his guilty plea, and that the defendant persisted in such plea.

We, therefore, conclude that the defendant's plea was properly accepted by the trial court. Upon review of the record, we are convinced that an appeal would be wholly frivolous, and so the Public Defender's motion is allowed, and the judgment is affirmed.

JUDGMENT AFFIRMED

McNAMARA, P.J. and DEMPSEY, J. concur.

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 HARRY J. EVANS,)
)
 Defendant-Appellant.)

APPEAL FROM
 CIRCUIT COURT
 COOK COUNTY

HONORABLE
 FRANK S. LOVERDE,
 PRESIDING.

ABST.

MR. PRESIDING JUSTICE LEIGHTON DELIVERED THE OPINION OF THE COURT:

Defendant appeals a bench trial conviction of driving a motor vehicle while under the influence of intoxicating liquor. The complaint alleged violation of Section 47 of the Uniform Act Regulating Traffic on Highways. Ill. Rev. Stat. 1965, ch. 95-1/2, §144. After a post-trial motion was overruled, defendant was fined and ordered to pay costs. The sole issue is whether he was proven guilty beyond a reasonable doubt.

At about 7:35 P.M. on June 15, 1969, John Glynn, a policeman, saw an automobile parked in a bus stop, a "No Parking" zone, 30 feet north of East 53rd Street and South Lake Park Avenue in Chicago. The motor was running; its driver (the defendant) was slumped over the steering wheel. Glynn opened the car door and asked the driver for his operator's license. Defendant "[a]ppeared to be incoherent and unable to produce his driver's license at that time." Defendant told the officer that he was waiting for his wife who worked nearby. Glynn detected a smell of alcohol. He arrested defendant and then drove the car to a police station. There, an alcoholic influence report was prepared in which Glynn said of defendant: "[t]he odor of alcohol on his breath was moderate, the color of his face was normal. His attitude was polite. He was -- His walking was staggering, his turning was slow. -- and off-balance (sic)." A short time later Glynn signed a sworn complaint in which he alleged that defendant, on June 15, 1969,

was "[d]riving a motor vehicle while under the influence of intoxicating liquor or narcotic drugs."

At the trial, defendant and his wife testified. It appears that defendant was a painter. On June 15 he drove his car 104 miles from work to where he was waiting for his wife when he was arrested. He explained his being slumped over the steering wheel of his car by saying that at the bus stop, because it was 85 to 90 degrees outside, he turned on the air conditioner. Defendant testified that apparently the cool air caused him to fall asleep. When Glynn awoke him, defendant explained to the officer that there was nothing wrong with him. He was unable to produce his driver's license because "[h]e (Glynn) got me excited -- I just woke up." Concerning what he had consumed, defendant testified that he had stopped at home, ate a sandwich and drank a can of beer. At the police station, he said Glynn returned the keys to his car but told him not to drive. Defendant was not cross-examined.

His wife testified that she saw defendant in the police station but he did not appear to be under the influence of intoxicating liquor. When they left, he drove the car because "I felt it was easier for him to drive than for me, ... I was upset." Indeed, Glynn supported the defense when he testified that defendant's behavior was cooperative, his manner was polite and the color of his face and his clothes were normal. And, it appears defendant's claim that he was sober when Glynn observed him in the station was supported by the testimony of his wife.

Having made the charge, the State had the burden of proving beyond a reasonable doubt that defendant, at the time in question, drove his automobile while under the influence of intoxicating liquor. People v. Clark, 123 Ill. App. 2d 41, 259 N.E. 2d 636.

This court is well aware that the trial judge's determinations concerning credibility of witnesses is entitled to great weight. However, in this case, the State's evidence consisting of Officer Glynn's testimony was not legally sufficient to prove the charge; it raises a reasonable doubt of defendant's guilt. People v. Foster, 114 Ill. App. 2d 357, 252 N.E. 2d 722; People v. Taylor, 110 Ill. App. 2d 81, 249 N.E. 2d 127. Under these circumstances we are compelled to reverse the conviction. People v. Mundorf, 85 Ill. App. 2d 244, 229 N.E. 2d 313. Judgment is reversed.

JUDGMENT REVERSED.

McCORMICK, J. and STAMOS, J., Concur.

Publish abstract only.

54931

132 I.A. 800

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)
vs.)
JOSEPH E. WOODS,)
Defendant-Appellant.)

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.
HON. JACQUES F. HEILINGOETZ
Presiding.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

ABST.

Defendant was indicted for the crime of armed robbery and, through his privately retained counsel, entered a plea of not guilty to the charge. Defendant's privately retained counsel was thereafter allowed to withdraw from the case and the Public Defender of Cook County was appointed to represent him. On March 1, 1968, after conference with his counsel, defendant changed his plea to that of guilty, and he was found guilty by the court as charged. Defendant was placed on probation for a period of five years, the first year of which was to be served in the House of Correction.

On December 19, 1969 defendant's probation officer reported to the trial court that defendant had been arrested in Highland, Indiana, on November 27, 1969, in possession of a stolen automobile, two loaded revolvers, and a set of burglary tools. At the hearing on the rule to show cause why the defendant's probation should not be revoked, defendant was again represented by the Public Defender and entered a plea of guilty to the violation of probation charges. Defendant's probation was revoked, and he was sentenced to a term of two years to four years in the penitentiary. He appeals from that judgment.

The Public Defender of Cook County was appointed counsel for defendant on appeal and has filed in this Court a petition for leave to withdraw as appellate counsel. Pursuant to *Anders v. California*, 386 U.S. 738, the Public Defender has also filed a brief in support

of his petition alleging the appeal to be without merit.

This Court thereafter notified the defendant of the pending petition and granted him leave to file points in support of the appeal. Defendant has not responded.

The petition and brief of the Public Defender allege that the sole question which could be raised on appeal relates to the procedural propriety of the hearing on the rule to show cause. The procedure followed below conformed substantially to that required by statute and case law of this state governing the matter. (Ill. Rev. Stat. 1969, Chap. 38, Para. 117-3; People v. Price, 24 Ill. App. 2d 364. See also People v. Dwyer, 57 Ill. App. 2d 343.)

Defendant, at the time of the hearing on the rule to show cause, was almost twenty-six years of age, had completed one and one-half years of college education, and had served in the military. Defendant was present in open court with his counsel, was advised of the facts of the probation violations, and pleaded guilty to those charges after a conference with his counsel. Examination of the record by this Court, as required by the Anders decision, reveals that defendant fully understood the nature of the proceedings against him and the consequences of his plea of guilty. Further, a hearing in aggravation and mitigation was held after the finding of guilty and the revocation of the probation. From all the circumstances disclosed by the record we conclude that the appeal is frivolous and without merit. The Public Defender of Cook County is granted leave to withdraw as appellate counsel for defendant. The judgment is affirmed.

PETITION ALLOWED.
JUDGMENT AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
Plaintiff-Appellee,)	
	)	CIRCUIT COURT
vs.)	
	)	COOK COUNTY.
TOMMY YARBER (Impleaded),)	
Defendant-Appellant.)	)	Hon. Francis T. Delaney,
		Presiding.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

ABST.

Indictments were returned against defendant charging him with the offenses of robbery and of theft of property having a value in excess of \$150. After initially entering a plea of not guilty to the charges, defendant withdrew his plea and entered a general plea of guilty. He was found guilty as charged and was placed on probation for a period of four years, the first six months of which were to be served in the House of Correction.

Within the term of probation a rule to show cause why defendant's probation should not be revoked was issued, on grounds that the defendant had committed and had been convicted of the offense of criminal damage to property in violation of the terms of the probation. At the hearing on the rule, defendant admitted that he had pleaded guilty to the criminal damage charge, and witnesses who had observed defendant's conduct in that regard gave evidence. Defendant's probation was revoked and he was sentenced to a term of two years to four years in the penitentiary on each charge, the sentences to run concurrently. He appeals.

The Public Defender of Cook County, who was appointed to represent the defendant at the original trial, at the hearing on the rule to show cause, and on this appeal, has filed a petition in this Court for leave to withdraw as appellate counsel, on grounds that the appeal is without merit and could not possibly be successful. Pursuant to the requirements of *Anders v. California*,

386 U.S. 738, the Public Defender has also filed a brief in support of his petition raising the one issue which, after a review of the common law record and the report of proceedings in this case, was believed might conceivably serve as the basis of an appeal: Whether the procedure followed at the hearing on the rule to show cause why defendant's probation should not be revoked was proper.

This Court thereafter notified the defendant of the pending petition and granted him leave to file points in support of the appeal. Defendant has not responded.

The procedure followed at the hearing on the rule to show cause conformed substantially to that required by statute and case law of this state governing the matter. (Ill. Rev. Stat. 1969, Chap. 38, Para. 117-3; *People v. Price*, 24 Ill. App. 2d 364. See also *People v. Dwyer*, 57 Ill. App. 2d 343.)

Examination of the common law record and the report of proceedings by this Court, as required by the Anders decision, discloses no arguable points other than raised by the Public Defender. The common law record and the report of proceedings also reveal that the defendant understood the nature of the proceedings against him. He was notified of the alleged violation of his probation, to which he pleaded guilty, and was present in open court with his appointed counsel. Evidence was presented against him, apart from his own admission of guilt, which showed his complicity in the offense of criminal damage to property in violation of the terms of his probation. From all the circumstances disclosed by the common law record and the report of proceedings we conclude that the appeal is frivolous and without merit. The Public Defender of Cook

County is granted leave to withdraw as appellate counsel for defendant. The judgments are affirmed.

\ PETITION ALLOWED.
JUDGMENTS AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

55023

732 I.A.² 805

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

vs.)

CHARLEY WILLIAMS,)

Defendant-Appellant.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

Hon. Philip Romiti,
Presiding.

ABST.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

After jury trial, defendant was convicted of burglary and sentenced to 1 to 5 years. The only point raised by his counsel on appeal is that the trial court erred in receiving defendant's oral inculpatory statement in evidence because proper Miranda warnings were not given.

The evidence for the People consisted primarily of testimony by police. Officer Edward Dziubarczyk testified that about 3:30 a.m. on July 8, 1969, he responded to a burglar alarm call originating from a liquor store on the south side of Chicago. This store was a large establishment consisting of three store fronts. At the scene, he met Officer Thomas Bridges.

When the officers approached the store, they found it well lit. A green plastic clothes line was hanging from a hole in the roof down to the floor. A man was in the process of entering the premises through a hole in the roof as the officers saw two legs dangling from the rope. Officer Dziubarczyk climbed to the top of the roof and saw a man coming up from the hole who started running to the north end of the roof. Upon being approached on the roof, the man, identified without doubt as the defendant, told the officer, "At least you could have let me get away with it." No point is made as to this voluntary "on the scene" statement. People v. Ricketson, 129 Ill App 2d 365, 376; In re Orr, 38 Ill 2d 417, 423. Officer Bridges had

followed the witness onto the roof. On the roof, the officers found that a hole had been made by use of a hammer. Portions of the roof debris that had been removed were still around the hole.

The court held a hearing, out of the presence of the jury, on the written motion of the defendant to suppress his confession. C. 38 §114-11(f). At this hearing, Officer Joseph Spatz testified that, when defendant was in custody at the police station in the presence of Officer Francis Gutrich and others, he warned defendant of his rights. It is conceded that this warning, as set forth in the testimony of the officer, constituted full and complete compliance with all of the Miranda guide lines and requirements. Defendant then shrugged his shoulders and said, "Why not?" and proceeded to answer a number of questions. He stated that he was breaking into the liquor store; that he had broken a hole in the roof; that he was going in there mostly for money and that he was lowering himself through the hole in the roof by means of the rope. Officer Francis Gutrich also testified on the motion. He corroborated the evidence with reference to the oral confession. He stated that the warnings were orally given to the defendant by Officer Spatz. No other evidence was offered or heard on the motion. The trial court accordingly denied the motion. Officer Gutrich then testified before the jury as to the oral statement made by defendant and identified him.

Defendant testified in his own behalf. He stated that about 2:30 in the morning he was walking down 63rd Street, in Chicago, on the way home, drinking a can of beer. A police officer stopped defendant, searched him and took him inside of his automobile. When defendant asked the charge against him the officer said, "Disorderly conduct." The officer then drove defendant to the liquor store in question where there were perhaps 5 or 6 more policemen. One of them identified defendant as the man he had

seen on the roof. The officers then took defendant to the police station where they questioned him about the burglary. He denied any knowledge of the burglary. He never knew that he was under arrest for burglary until so advised the next morning in court. He testified that he had never seen or touched the hammer at any time. Defendant's testimony is without any corroboration.

Defendant then rested. The State recalled Officer Joseph Spatz in rebuttal. He testified on direct examination that he gave the Miranda warnings to the defendant. He then testified to the defendant's statement with reference to commission of the burglary. This testimony corroborated that of Officer Gutrich.

The entire point in this appeal is predicated upon the fact that, on direct examination of Officer Joseph Spatz as a rebuttal witness, in describing the Miranda warnings, he told the defendant that he could obtain a lawyer or that if he couldn't get one a lawyer would be obtained for him. The argument is made that this warning was insufficient because it did not specifically tell defendant, "that he had a right to counsel while being interrogated." On cross-examination of Officer Spatz, the following took place:

Q. And he didn't want to make a phone call, right?

A. No, he didn't.

Q. And he didn't want an attorney there?

A. No, he didn't ask for any, and we offered him and he said no.

Q. Of course, you fully explained this to him, his rights?

A. That he could have a lawyer, yes, sir.

Q. You also asked him if he understood, isn't that correct?

A. That's right.

Q. And he answered in the affirmative that he understood?

A. That's right."

A mere recital of the above facts is sufficient to indicate that defendant's contention must necessarily be rejected. In the first place, considering all the evidence in the record, it is clear that all necessary warnings were fully and properly given to the defendant. Defendant cites *People v. Braun*, 98 Ill App 2d 5, which has no bearing upon this situation. In that case, the court held that a confession should be excluded because defendant was not specifically told that if he could not afford an attorney one would be appointed for him. No such situation exists in the case at bar. Furthermore, if the statement of the Miranda warnings made by this rebuttal witness before the jury on direct examination could be criticized on the ground that defendant was not specifically told that his lawyer would be present at the interrogation, this situation was rectified by the testimony on cross-examination.

The requirement of Miranda goes to the "substance of the warning." *People v. Landgham*, 122 Ill App 2d 9, 22. There are no inflexible semantic requirements. The test is whether the statements made by the officer to the accused gave, "a clear, understandable warning of all his rights." *People v. Bosveld*, 109 Ill App 2d 317, 321 as quoted from *Coyote v. United States*, 380 F2d 305 (10th Cir 1967). In our opinion, any fair and reasonable reading of this record will disclose that the requirements of Miranda were scrupulously observed. This appears not only concerning the evidence heard by the court alone but also with reference to the additional evidence heard by the jury. The oral confession of the defendant was undoubtedly competent and properly received.

However, from an additional point of view, there is no merit to defendant's claim. The pertinent statute prescribes the procedure without room for argument or equivocation. C. 38 §114-11(f). The issue of the admissibility of the confession is not to be submitted to the jury. The trial court was correct in hearing evidence out of the presence of the jury. And, the

only evidence produced showed full compliance with Miranda. Consequently the able trial judge acted properly in overruling the motion to suppress and in receiving the confession in evidence.

The additional testimony given before the jury on rebuttal concerning the Miranda warnings, which is the entire and only basis for defendant's argument, is pure surplusage which need never have been brought into the record. It pertained only to the admissibility of the confession in which the jury had no part.

The only conceivable argument which defendant could make here is that the circumstances surrounding the confession, including the warnings, might have some "bearing upon the credibility or the weight to be given to the confession." (C. 38 §114-11(f)). The State had the burden of proving by a preponderance of the evidence that the statement given by defendant was voluntary. *People v. Coddington*, 123 Ill App 2d 351, 369. Also, the ruling of the trial court that the warnings were properly given may not be disturbed by this court unless it is shown to be contrary to the manifest weight of the evidence. *People v. Nemke*, 46 Ill 2d 49, 56; *People v. Langford*, 123 Ill App 2d 437, 443.

According to defendant's own testimony, no warnings of any kind were given; and, when he was questioned about the burglary, he merely denied it and said that he knew nothing about it. Upon reading the entire record, the conclusion is inevitable that defendant confessed this crime to the police after complete and proper warnings and with full knowledge of his rights. It follows that the verdict of guilty must be affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J. and LYONS, J. concur.

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Plaintiff-Appellee,)	
)	CIRCUIT COURT,
)	
vs.)	COOK COUNTY.
)	
)	HON. FRANCIS T. DELANEY,
WILLIE SCOTT,)	Presiding.
Defendant-Appellant.)	

ABST.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a jury trial of the crime of murder and was sentenced to a term of twenty-five years to forty years in the penitentiary. He appeals.

Chicago Police Officer Iver Johnson testified that at 3:00 P.M. on August 11, 1967 he received a dispatch over his patrol car radio of an injured man lying on the sidewalk at 5912 South State Street in Chicago. The officer arrived at the scene a few minutes later and observed Erskine Jones, Jr., lying in a pool of blood. The officer testified that he asked Jones if he had been shot or stabbed and that Jones replied in a mumbled voice that he had been stabbed. The officer also asked Jones who had stabbed him and Jones allegedly replied, again mumbling, "his brother-in-law done it." Jones then lost consciousness and died within an hour at a nearby hospital. Acting upon an objection raised by the People, the trial court did not allow the statement concerning the brother-in-law into evidence.

I.D. Johnson testified that he was the father of the defendant's estranged wife, Evonia Scott, and that he lived with his wife and family, including Mrs. Scott, at 5936 South State Street. He testified that he was sitting in the living room of his home watching television about 2:00 P.M. on the day of the occurrence when the

defendant arrived at the house asking for Mrs. Scott. Defendant was told that his wife was at work at that time and departed. About 2:30 or 2:45 P.M. the witness saw the deceased come to his home also looking for Mrs. Scott. After being told that she was not home, the deceased walked to the front gate of the property, spoke to a youth for a few minutes and then walked north toward 59th Street. Mr. Johnson testified that at the time the deceased was in the doorway to his home, the defendant was standing across the street. About two or three minutes after the deceased had walked north from the Johnson home, Mr. Johnson observed the defendant pass in front of the Johnson residence on the same side of the street as the deceased had walked, also proceeding north.

Mr. Johnson further testified that about 4:30 or 5:00 that evening two Chicago police officers arrived at his home asking questions about the defendant. While the officers were in the house the telephone rang and Mrs. Johnson answered the call. Mr. Johnson then left the house to pick Mrs. Scott up from work. Mr. Johnson and Mrs. Scott arrived home about 6:30 P.M. and the telephone rang again. The call was for Mrs. Scott, who gave the receiver to one of the police officers and who spoke to the caller on an extension phone. Mrs. Scott and the officers then left the house.

Mrs. Gussie Johnson, wife of I. D. Johnson and mother of Mrs. Scott, testified that she spoke to the defendant by telephone about 3:30 P.M. on the day in question and that the defendant asked for Mrs. Scott. When told that she was not at home, the defendant threatened to come to the Johnson home and kill the entire family, at which point Mrs. Johnson hung up the receiver. The defendant again telephoned about 5:15 P.M. asking for his wife and was told by Mrs. Johnson that she would be home about 6:30 P.M. The police

officers were present at the time the latter call was made. Defendant again called about 6:30 P.M. asking for Mrs. Scott, at which time Mrs. Johnson handed the receiver to Mrs. Scott who in turn told one of the police officers to listen to the conversation on an extension line. After a brief conversation on the telephone, the officers and Mrs. Scott left the house.

Mrs. Evonia Scott testified that she and the defendant were husband and wife, but that on August 11, 1967 they were living apart, the witness living with her parents at 5936 South State Street. She arrived home from work about 6:30 P.M. on that date and received a telephone call from the defendant. Mrs. Scott testified that she spoke to the defendant on one phone in the house while a police officer listened in on the conversation on an extension phone. After the telephone conversation she and the officers went to 5727 Calumet Avenue in the city.

Mrs. Scott testified that when they arrived at that address other police officers were at the scene and that she observed the defendant peeking around the corner of a building from between two buildings. When the defendant observed the witness and the officers he ran and threw away a large, single-blade, yellow-handle knife. The knife was retrieved by one of the officers and the defendant was placed under arrest. The witness identified the knife at trial as the one which the defendant attempted to discard at the time of his arrest.

Mrs. Hilda Boyd testified for the People that she resided at 6020 South Wabash Avenue in the city on August 11, 1967. She knew both the defendant and his wife, having gone to school with the latter for several years. About 4:30 or 5:00 P.M. on the day in question, the defendant entered her apartment and asked the witness

if she knew where Mrs. Scott was. The witness replied in the negative, at which the defendant stated, "Well, if you see her, tell her I am going to kill her." The witness further testified that the defendant also stated that "he thought he had just killed a man down on 59th and State." The witness stated that the defendant told her that the person he had stabbed had been seeing the defendant's wife. The defendant also produced a yellow-handle knife from his pocket and stated that it was the knife which he used to stab the other man. Mrs. Boyd identified the knife at trial as the weapon shown to her by the defendant at her home.

Chicago Police Officer Joseph Wasilewski testified that he and his partner, Officer Buehler, were assigned to investigate the stabbing, and that in the course of their investigation they spoke to Mr. and Mrs. Johnson who related that they knew both the deceased and the defendant. After the defendant's wife arrived home from work she and the officers went to the building where the defendant had been staying and effected the defendant's arrest. The officers also retrieved a yellow-handle knife discarded by the defendant at the time of his arrest, which was introduced into evidence.

Defendant testified in his own behalf that he was in his apartment at 5727 Calumet Avenue from 2:30 P.M. until his arrest some time after 6:30 P.M. He further denied stabbing the deceased and denied telephoning anyone during the period of time he was in his apartment.

Defendant first maintains that it was a denial of due process of law to exclude the statement of the deceased allegedly identifying his attacker as someone other than the defendant, contending that the statement was either a dying declaration, a spontaneous utterance, or a part of the res gestae.

From the cases cited by defendant it is clear that the statement allegedly made by the deceased before his death was neither a

dying declaration nor a spontaneous utterance. To have qualified as a dying declaration, the statement must have been made under the fixed belief and moral conviction entertained by the deceased that his death was impending and certain to follow almost immediately, without the opportunity for repentance, and in the absence of all hope of avoidance, when the victim has despaired of life. See *People v. Beier*, 29 Ill. 2d 511.

In the instant case there is no evidence of the deceased's state of mind at the time he made the alleged statement. Officer Johnson was specifically asked questions which would have elicited such state of mind, and the officer replied that he had no idea of what the deceased was thinking at the time he made the alleged statement.

To have qualified as a spontaneous utterance the cases require first, that an event occur which is sufficiently startling to produce a spontaneous and unreflected statement; second, that there be absence of time to fabricate; and third, that the statement made must relate to the circumstances. *People v. Poland*, 22 Ill. 2d 175; *People v. Damen*, 28 Ill. 2d 464.

The record in the instant case fails to demonstrate spontaneity and absence of time to fabricate. The defendant had been seen walking on State Street about two or three minutes after, and in the same direction as the deceased had passed about 2:45 P.M. on the day in question. Officer Johnson received a radio dispatch at 3:00 P.M. to investigate an injured man lying on the sidewalk just a few doors north of where the deceased was last seen walking, and Officer Johnson arrived at the scene a few minutes after 3:00 P.M. Upon questioning by the officer, the deceased made his alleged statement. There was sufficient time between the stabbing and the time of the alleged statement for the deceased to have fabricated the statement.

It should be noted that the officer testified that he was not completely certain of what the deceased told him. He testified that the statement, "my brother-in-law done it," was an "interpretation" on the officer's part of what the deceased related to him because the deceased was mumbling, his voice was very weak and low, and he spoke in a tone that was difficult to understand. The officer specifically stated that he "did not clearly understand any part of the statement." The trial court properly refused to allow the alleged statement to go to the jury.

Defendant's argument based on "res gestae" must be rejected. This term has been aptly described as an "amorphous concept" which "not only fails to contribute to an understanding of the problem but may actually inhibit any reasonable analysis." *People v. Poland*, 22 Ill. 2d 175, 180.

Defendant next maintains that the trial court should have ordered, as a matter of law, a behavioral clinic examination of the defendant when defendant's family history and his anti-social past became known to the court. He argues that the evidence that of ten children in his family, three were in mental institutions, that his past record shows a long series of crimes and offenses, and that he was placed in a mental institution for a period of eight years, indicates a history of mental instability.

As to defendant's alleged "past mental history," the record shows that he was placed in a "training school" at the age of three when his mother died. There is no evidence that he was placed in the school for mental treatment.

The record before the trial judge in no way suggested that defendant was insane or that he was not competent to stand trial. The fact that three persons in his immediate family were placed in mental institutions does not, of itself, relate to defendant's

mental stability; further, there is no direct relationship between defendant's past anti-social behavior and his mental stability. The record does not reflect a "bona fide doubt" as to defendant's sanity or his competency to stand trial. See *People v. Smith*, 44 Ill. 2d 82. The cases cited by defendant are inapposite on their facts from the situation in the case at bar. See *People v. Burson*, 11 Ill. 2d 360; *People v. DeSimone*, 28 Ill. 2d 72.

Defendant next contends that the admission of evidence that his wife's jaw had been broken prior to the incident in question was prejudicial error since it allegedly reflected upon defendant as a "wife-beater." He also contends that it was error to have admitted the alleged threats which he made to the Johnsons and to Mrs. Boyd.

As to the testimony of the broken jaw, no connection was made or attempted, either during the examination of the witnesses who testified to Mrs. Scott's jaw or during closing argument, suggesting that it was defendant who broke his wife's jaw or that he was in any manner a "wife-beater" as defendant contends. This contention is based upon speculation, and for that reason the cases cited by defendant in support thereof are not in point. (See *United States v. Ogilvie*, 337 F. 2d 427; *People v. Galloway*, 7 Ill. 2d 527.)

The testimony as to the threats which the defendant voiced to the Johnsons and to Mrs. Boyd was not objected to at trial. The matter cannot be raised upon appeal. *People v. Adams*, 41 Ill. 2d 98.

The final point raised by defendant is that the evidence fails to prove him guilty beyond a reasonable doubt. We disagree.

The defendant was seen across the street from the Johnson

residence at the time the deceased was at the front door; he was seen walking on the same side of the street and in the same direction as the deceased, fifteen minutes before a police officer received a radio dispatch to investigate the assault. The assault took place only a few doors from where both the defendant and the deceased were last seen. Defendant appeared at the apartment of one witness after the stabbing and produced a knife which he stated he had used in a stabbing at "59th and State." That same knife was identified at trial as the weapon which defendant attempted to discard at the time of his arrest. Defendant was in the vicinity of the crime at the time it occurred, he had the opportunity and motive to commit the crime, and he was in possession of a weapon suitable for its commission. From all the circumstances presented, the jury could reasonably have found defendant guilty of murder. (See People v. Tribbett, 41 Ill. 2d 267.)

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

55197

ABST.

PEOPLE OF THE STATE OF ILLINOIS,)
 Plaintiff-Appellee,)

v.

JUSTIN THOMAS,)
 Defendant-Appellant.)

Appeal from the Circuit
 Court of Cook County.

Daniel J. Ryan, J.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

The public defender, who represents the defendant in this appeal, has requested that he be allowed to withdraw as appellate counsel. In his supporting brief he asserts that he can find no justification for an appeal.

The defendant pleaded guilty to an indictment charging him with burglary. After hearing testimony stipulated to by the defendant, his counsel and the State, the trial court sentenced him to a term of three to six years in the penitentiary to run concurrently with a sentence imposed in another case. The public defender, having searched the transcript of the common law record and the report of proceedings, states that the only possible basis for an appeal would be whether the court fully admonished the defendant of the significance and consequence of his plea of guilty. The public defender concludes that the admonishment was adequate.

The defendant was notified of his counsel's motion and was given two and one-half months to file additional points in support of his appeal. He has not responded.

We have reviewed the record and find that the trial court carefully informed the defendant of the charges against him and of the penalty for the crime of burglary; explained his right to a jury trial and fully admonished him of the consequences of his guilty plea.

The public defender correctly appraised this appeal: the court completely fulfilled its responsibility before accepting the defendant's plea of guilty and there is no point upon which an appeal can be based. The motion to withdraw is allowed and the judgment is affirmed.

Affirmed.

McNamara, P.J., and Schwartz, J., concur.

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
Plaintiff-Appellee,)	
	)	CIRCUIT COURT,
vs.)	
	)	COOK COUNTY.
FRANK GRIFFIN,)	
Defendant-Appellant.)	)	HON. WILLIAM S. WHITE, Presiding.

ABST.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

On November 29, 1967 defendant entered a general plea of guilty to an indictment charging him with armed robbery. He was found guilty by the trial court and was placed on probation for a period of five years, the first year of which was to be served in the County Jail.

On May 26 and 27, 1969 defendant pleaded guilty to indictments charging him with theft for which he received short jail sentences. With the foregoing convictions alleged as violations of the terms of his probation, a rule to show cause why defendant's probation on the armed robbery conviction should not be revoked was issued. At the hearing on the rule, defendant, represented by appointed counsel, admitted having pleaded guilty to the charges of theft and also admitted having served the jail sentences imposed. Defendant's probation was revoked, and after a hearing in aggravation and mitigation, he was sentenced to a term of one year to four years in the penitentiary. He appeals.

The Public Defender of Cook County, who was appointed to represent the defendant at the original trial, at the hearing on the rule to show cause, and on this appeal, has filed a petition in this Court for leave to withdraw as appellate counsel, on grounds that the appeal is without merit and could not possibly be successful. Pursuant to the requirements set out in *Anders v. California*,

386 U.S. 738, the Public Defender has also filed a brief in support of the petition raising the one issue which, after a review of the entire record in this case, was believed might conceivably serve as the basis of an appeal: "Whether the probation violation was proved where defense counsel admitted at the probation violation hearing that defendant had been convicted twice for theft while on probation and was, in fact, serving time for these convictions, and where the defendant himself admitted having been convicted?"

This Court thereafter notified the defendant of the pending petition and granted him leave to file points in support of the appeal. Defendant has not responded.

A violation of probation need not be proven beyond all reasonable doubt. *People v. Kostaken*, 16 Ill. App. 2d 395. The un rebutted evidence before the trier of fact was that defendant had been convicted of two theft offenses which had been committed during the period of his probation on the armed robbery conviction. Defendant admitted having pleaded guilty to those charges and also admitted having served the sentences imposed therefor. Defendant made the claim at the hearing on the rule to show cause that although he did in fact plead guilty to the theft charges and did in fact serve the sentences imposed, he was actually innocent of those charges. The record, however, reveals that no appeal was taken from either of the judgments in the theft convictions, and the records of those judgments stand as evidence against defendant which the trial judge obviously concluded preponderated over defendant's protestations of innocence of those charges.

Examination of the entire record of this case by this Court, as required by the *Anders* decision, discloses no arguable points other

than raised by the Public Defender. From all the circumstances disclosed by the record we conclude that the appeal is frivolous and without merit. The Public Defender of Cook County is granted leave to withdraw as appellate counsel for the defendant. The judgment is affirmed.

PETITION ALLOWED.
JUDGMENT AFFIRMED.

LYONS and GOLDBERG, JJ., concur.

No. 55450

132 T.A. 842

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY.
)

WYLIE HARRIS, (Impleaded),
Defendant-Appellant.

) HONORABLE
) FRANK J. WILSON,
) PRESIDING.
)

ABST.

MR. JUSTICE MCGLOON DELIVERED THE OPINION OF THE COURT.

Defendant, Wylie Harris, was charged by indictment with the offense of armed robbery. At the time of his arraignment a plea of not guilty was entered. The Public Defender entered his appearance as counsel for defendant. On March 4, 1970, the case was called for trial, and at that time the plea of not guilty was withdrawn and a plea of guilty to the indictment was entered by the defendant. The plea of guilty to the indictment was accepted by the court, and the defendant was sentenced to a term of four years to four years and one day in the Illinois State Penitentiary. The defendant has appealed.

The Public Defender was appointed by the court to represent the defendant on this appeal. He now moves for permission to withdraw as attorney of record, and has filed such motion pursuant to Anders v. California, 386 U.S. 738. Notice of that motion and copies of the petition and brief were mailed to defendant on November 24, 1970. Defendant has not responded.

Before the court can accept a plea of guilty, it is incumbent upon the judge to inform a defendant of the consequences of his plea and the maximum penalty which may by law be imposed on him. 1969 Ill. Rev. Stat., Ch. 38, §115-2. A plea of guilty, voluntarily and understandingly entered, waives all non-jurisdictional defects. People v. Scott, 29 Ill. 2d 429, 194 N.E. 2d 197.

In the instant case the court had the following colloquy with the defendant after it had been informed that the defendant wished to withdraw his plea of not guilty:

THE COURT: Mr. Harris, first of all, do you understand the nature of this indictment against you? There are five counts of armed robbery. Do you understand the nature of the charge?

THE DEFENDANT: Yes.

THE COURT: Your counsel advises me you wish to change your pleas of not guilty to the five counts in this indictment. Is that correct?

THE DEFENDANT: Correct.

THE COURT: When you plead guilty, you automatically waive your right to a jury trial. Do you also understand that?

THE DEFENDANT: I understand that.

THE COURT: Before accepting your plea of guilty it is my duty to advise you on your plea of guilty to this indictment, charging you with robbery while armed, you may be sent to the penitentiary for a term of years; it may be any number of years, but not less than two years. Knowing that, do you still persist in your plea of guilty?

THE DEFENDANT: Yes, I do.

THE COURT: All right. Let the record show that with the defendant's permission, we have had numerous conferences relative to this case. The Court was fully advised of all the facts surrounding this case. The Court has also been fully advised by the various motions on this case held in this courtroom yesterday. The Court is fully advised in aggravation and mitigation. It has heard, in the conferences, the aggravation and mitigation, the criminal background of this defendant and the facts surrounding this case.

Also let the record show that the defendant has been fully advised of the consequences of his plea of guilty to this indictment, and after being so advised persists in his plea. The plea, therefore, will be accepted. There will be a finding of guilty of robbery while armed in manner and form as charged in the indictment. Judgment on the finding.

A review of the record shows that the court fully informed the defendant of the consequences of his guilty plea and that the defendant persisted in such plea. We are convinced that an appeal would be wholly frivolous. We conclude that the defendant's plea was properly accepted by the trial court, and we, therefore, allow the Public Defender's motion, and the judgment is affirmed.

JUDGMENT AFFIRMED

McNAMARA, P.J. and DEMPSEY, J. concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
June 9, 1971 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

No. 69-164

FILED

JUN 9 1971

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS)	
)	
Plaintiff-Appellee	)	Appeal from the Circuit
	)	Court of Du Page County
-vs-)	
)	
GERALD VOCALINO	)	Hon. L. L. Rechenmacher
	)	Judge Presiding
)	
Defendant-Appellant)	

JUDGE WILLIAM L. GUILD delivered the opinion of the Court:

The defendant Gerald Vocalino was tried before a jury for the offense of aggravated battery upon a school teacher.. He was represented by counsel of his own choice, was found guilty and sentenced to six months at the Illinois State Farm at Vandalia.

After sentence the defendant petitioned the court for the appointment of the Public Defender and that he be furnished as an indigent person, the common law record and transcript of the proceedings. These requests were denied by the trial court; but at a later date the trial court appointed the Public Defender to prosecute the appeal and granted the defendant's request for the transcript and record.

On March 25, 1971 the Public Defender filed the notice of appeal. After the appeal had been instituted the defendant voluntarily appeared before the trial court and was committed to the State Farm and has served his sentence while this appeal was pending.

On February 3rd, 1971 the Public Defender filed a petition for leave to withdraw from the case on the ground that he was

unable to find any legal justification of any grounds for appeal. He has also filed a brief in support of the petition, setting forth the requirements of Anders v. State of California, 386 U.S.738, 87 S.Ct.1396. The brief set forth two points which defense counsel thought might be arguable, viz., was the denial of probation and an imposition of a six months sentence an abuse of discretion, and secondly, was the finding of the jury contrary to the law and the fact.

Copies of the Public Defender's February 3rd, 1971 motion and statement were served by mail upon the defendant at his place of residence on January 28, 1971. On February 3rd, 1971 this court upon it's own motion notified the defendant that the matter was continued to March 5, 1971 in order to allow him to file any additional pleadings or to show why the petition should not be allowed and the judgment of conviction affirmed. The records of this court show that the defendant did not file a response to this notification.

This court has examined the record and transcript filed. Considering the first possible contention of the question of abuse of discretion by the trial court in its denial of probation, we note the following. We find that the action of the trial court was not arbitrary, and as the courts of Illinois have stated repeatedly, in the absence of any showing of arbitrary or unreasonable refusal of the trial court to grant probation, this court will not substitute its judgment for that of the trial court.

Examination of the voluminous record likewise, shows that the defendant was afforded a complete hearing, was competently represented by counsel of his own choosing, and the finding of the jury is not contrary to either the law or

the facts set forth in the transcript. People v. Husser (94 Ill.App.2d 33, 236 N.E.2d 735) (1968); People v. Donovan (376 Ill.602, 35 N.E.2d 54) (1941).

This court has made a complete examination of the proceedings in accordance with the dictates of Anders v. California, supra, and the conclusion is that the possible legal points that might be raised are not "arguable on their merits" and that the appeal is "wholly frivolous." People v. Gray (102 Ill.App.2d 129, 243 N.E.2d, 545) (1968). Defendant's attorney's motion to withdraw is granted and the judgment of conviction is affirmed.

AFFIRMED.

MORAN, P.J. and ABRAHAMSON, J., CONCUR.

132 I.A.² 882

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
June 4, 1971 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
Second Judicial District

FILED

JUN 4 1971

HOWARD K. KELFITT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit
)	Court of the Nineteenth
Plaintiff-Appellee,)	Judicial Circuit, McHenry
)	County, Illinois.
vs.)	_____
)	
LOUIS P. HUFF, JR.,)	Honorable
)	Charles S. Parker,
Defendant-Appellant.)	Judge Presiding

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

Defendant Louis P. Huff, Jr., was convicted with a co-defendant, Fred Jennings, of aggravated battery and armed violence in a McHenry County Circuit Court bench trial. Defendant Huff was sentenced to three to eight years in the Illinois State Penitentiary after a hearing on his application for probation which was denied. His co-defendant, Jennings, was sentenced to a term of five to ten years in the Illinois State Penitentiary, and we have recently considered Jennings' appeal. People v. Jennings, ___ Ill. App. 2d ____.

In the Jennings case, Morton Zwick, Executive Director of the Illinois Defender Project, was appointed as appellate counsel by the trial court. Thereafter, Zwick filed a petition for leave to withdraw as counsel on appeal in this court, 18 L Ed 2d 493. pursuant to Anders v. California, 386 U.S. 738./ His petition for leave to withdraw was supported by a written brief and argument. In that case, after examining the record, as required, we concluded that the appeal lacked merit and if pursued further

would be frivolous. Therefore, we gave leave to withdraw to appellate counsel for defendant Jennings and affirmed the judgment of the trial court.

Zwick was also appointed counsel for the present appeal. He has filed a petition for leave to withdraw as counsel, based on the Anders case, which states that after a complete examination of the case, he is unable to find any legal points which are arguable on their merits, and also filed a brief and argument in support thereof.

Defendant Huff acknowledged receipt of his appointed counsel's petition to withdraw and notice from the Appellate Court clerk which stated the petitioner had been granted a continuance to February 15, 1971, so that he could file any additional matters that he might feel meritorious on his behalf or other matters as to why the petition should not be allowed and the court after proper review of the record, affirm the judgment against him. Thereafter, on February 11, 1971, Huff filed a pro se "motion for appointment of counsel if motion to withdraw is allowed." Despite the way he has labeled his motion, he raises the contention therein that he was not proved guilty of the charges against him for reasons which we will herein-after consider. The brief and argument of Zwick in support of his petition for leave to withdraw state the ^{possible} issues as: 1) whether the defendant knowingly and intelligently waived his right to trial by a jury; 2) whether the defendant's retained trial attorney was incompetent; 3) whether the court erred in not granting defendant's motion for continuance; 4) whether the defendant was proved guilty beyond a reasonable doubt; and 5) whether the sentence of three to eight years was excessive.

Both Huff and Jennings were tried in a joint bench trial and both were represented by the same retained counsel. The contention that Huff was not admonished of his constitutional right to be tried by a jury and the consequences of waiving a jury is without merit. Our examination of the record reveals not only that the judge properly admonished the defendant of his constitutional right to a trial by jury but also that Huff signed a jury waiver. There is nothing in the record to indicate that Huff did not knowingly and intelligently waive his right to trial by a jury. The contention that his retained counsel was incompetent has no merit. His counsel made the same motions, objections and arguments for Huff that we mentioned in the Jennings case, and which demonstrated that retained counsel very competently represented both defendants. As to the possible contention that the court erred in not granting defendant's motion for continuance, the same motion was made on behalf of defendant Jennings at the same time. The conclusion must be the same; namely, that the granting of such a motion is discretionary with the trial court and that no prejudice was shown by its refusal. The possible issue of whether the defendant was proved guilty beyond a reasonable doubt is raised by Zwick, as well as by Huff in his pro se motion and argument.

Dewey

The complaining witness, Brown, testified that on October 11, 1969, he had made a call to Huff's home, talked to Mrs. Huff and told her about a robbery. He further stated that he stayed out until about 1:30 a.m. that night and had 12 beers before he returned home. He apparently slept until about 3:00 p.m. the next afternoon when both defendants walked into his room. Brown said that Huff and Jennings came into his room

and that Huff had a .22 or .25 caliber handgun. Both defendants yelled at him and Jennings put brass knuckles on and went after his head. He further testified that they put a second gun in his mouth although he could not see it, and that the gun went off and the bullet struck him. Thereafter, he went to the hospital where he underwent surgery on his left eye, and now has no vision in it as a result of being shot. Zwick and the defendant point out that the State lacked physical evidence because the gun, brass knuckles and bullets were never produced. Zwick states further that there were no confessions from either of the defendants and that the conviction rests upon the credibility of the complaining witness, Dewey Brown. Although the trial herein was a joint trial of Jennings and Huff, Jennings did not testify. Huff did testify and there is a discrepancy between the testimony of Huff and Brown. Huff testified that the gun involved in the shooting was a .22 caliber handgun, which belonged to Brown, and that Brown shot himself. Brown testified he did not own a gun at the time of the shooting, but two defense witnesses, Mrs. Huff and Jennings' brother, stated that Brown had shown them a handgun on a date not long before the shooting occurred. Huff, in his pro se brief, contends that Brown lied when he testified that he did not have a gun when the shooting occurred and, therefore, none of his testimony should be believed. Huff also states/that Brown was the only person to testify that Huff was armed at the time in question. However, the question of credibility of the witnesses and the weight to be given their testimony is for the trier of the fact to decide. There is other conflicting evidence but based upon our examination of the record, we believe that the evidence is legally sufficient to warrant conviction and that

the evidence was not so unsatisfactory or unreasonable as to raise a serious doubt of the defendant's guilt.

Finally, defendant contends that the sentence was excessive and it is requested that this court reduce the sentence. The maximum sentence the defendant could have received would have been ten years. On hearing pursuant to defendant's application for probation, it was revealed that the defendant had a prior criminal record in both Minnesota and Wisconsin, and appeared to be having a serious drinking problem. The court denied the application for probation and thereafter sentenced the defendant as hereinbefore stated to a term of three to eight years in the Illinois State Penitentiary. Although this court has the authority to reduce the sentence pursuant to Supreme Court Rule 615 (B) (4), nevertheless this authority is used with caution and circumspection as the trial judge usually is in a superior position to make a sound determination concerning the punishment to be imposed. (People v. Taylor, 33 Ill. 2d 417.) Having considered the evidence produced which could have any possible bearing upon the punishment that was imposed, we believe the issue of the excessiveness of sentence is without merit.

As required by the Anders case, supra, we have examined the entire record and conclude that the appeal lacks merit and if pursued further would be frivolous. The motion of defendant's appellate counsel to withdraw is allowed; the motion of the defendant for appointment of counsel, if the motion of Zwick to withdraw is allowed, is hereby denied; and, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

SEIDENFELD and GUILD, JJ., concur.

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 7th day of December, in the year of our Lord one thousand nine hundred and seventy, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

July 20, 1971 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

JUL 22 1971

HOWARD K. KELLIST, Clerk
Appellate Court, 2d District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
vs.	)	Appeal from the Circuit
	)	Court of the 19th Judi-
GEORGE WASHINGTON DAVIS, a/k/a	)	cial Circuit, Lake
WALTER B. MILLER,	)	County, Illinois.
)	
Defendant-Appellant.)	

SEIDENFELD, Justice.

Defendant was indicted on charges of burglary, kidnapping, and theft committed on August 10th, 1969. A public defender was appointed to represent him. After a negotiated plea heard before the court, defendant pleaded guilty to one count of burglary contained in the single five count indictment. Following a pre-sentence investigation which was limited to the count to which defendant pleaded guilty, the defendant was sentenced to a term of four to eight years in the penitentiary. The State did not proceed upon the remaining counts.

The defendant filed a notice of appeal and the office of the Illinois Defender Project was appointed to represent him upon his appeal. Appellate counsel has petitioned for leave to withdraw from the case. He states that from an examination of the entire record the only basis for an appeal would be to raise the questions whether the trial court fully admonished the defendant as to the possible range of sentence, whether the sentence

was excessive and whether the indictment was sufficient. In accordance with the procedure set forth in Anders v. Calif., 386 U.S. 738 (1967), the defender has submitted the common law record and the transcript of proceedings to this court, and has filed a brief in support of his petition, stating that the direct appeal is wholly frivolous and without merit. A copy of the petition and brief was mailed to the defendant and he was permitted ample time to file any additional matters on his behalf but has not done so.

It clearly appears from the record that the defendant was advised of the minimum and maximum range of his sentence. He was informed by the court that he could be sent to the penitentiary "for any term, including the rest of your life" as a maximum; and he was informed by the State's Attorney in open court that the minimum was one year. In the course of the plea negotiations the negotiated term, minimum and maximum, was stated to defendant on the record and it clearly appears from the record that defendant understood the possible penalty before entering his plea.

The sentence was in accordance with defendant's bargain and was not excessive. There is no inflexible rule that the minimum sentence must be one-third of the maximum. See People v. Redfern, 118 Ill. App. 2d 334, 336, 337 (1969).

In Counts I, II and III of the Indictment, defendant is charged with burglary and kidnapping in one location; in Counts IV and V he is charged with theft and burglary in another location but on the same day. While it might be claimed that, as a factual matter, separate and distinct offenses growing out of different transactions were improperly charged in the same indictment, (see The People v. Jones, 291 Ill. 52, 54 (1920) and People v. Fleming, 121 Ill. App. 2d 97, 102 (1970)), the argument

has no merit here. For the State dropped the charges contained in Count I, II, III and V, thus curing any possible defects of misjoinder. Further, there was no motion to quash the Indictment at any stage of the proceedings. Defects in an indictment are waived by such failure. See The People v. Jones, 291 Ill. 52, supra, at page 54; The People v. Kroll, 259 Ill. 592, 593 (1913).

We have made a full examination of all the proceedings in accordance with Anders v. Calif., 386 U.S. 738, supra, and we sustain the position of the Defender. His motion for leave to withdraw is allowed and the judgment is affirmed.

Judgment affirmed.

ABRAHAMSON, J. and GUILD, J. concur.

132 I.A. 1094
(10-22-12-68) 14-9-80

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

ABST.

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 24th day
of June A. D. 19 71, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

FOURTH DISTRICT

Agenda No. 71-43

Plaintiff-Appellee

VS.

Defendant-Appellant

Appeal from
Circuit Court
McLean County

CRAVEN, J., delivered the opinion of the court.

Upon a plea of guilty to the charge of burglary, the defendant was denied probation and sentenced to a term of not less than three nor more than eight years in the Illinois State Penitentiary. By this appeal he asserts that his sentence is excessive and disparate. Two associates, who also pleaded guilty to the same offense, received lesser sentences. Donald Terven, aged 21 years, was placed on probation for five years with one year at the State Penal Farm. See People v. Terven, ___ Ill. App. 2d ___, 264 N.E.2d 538 (4th Dist. 1970). William Price, also 21, was sentenced to the Illinois State Penitentiary for a term of eighteen months to five years. The defendant was 22 years of age at the time of sentencing.

The record before us contains portions of the proceedings relating to Price and Terven, such having been included in this record pursuant to a stipulation.

The probation report and hearing furnished the trial court extensive information about the defendant Wheeler. In addition, the defendant was afforded ample opportunity to refute or correct any information of a derogatory nature. A review of that information reveals a pattern of involvement with the penal laws of this State as well as an admitted problem relating to the defendant's excessive use of alcohol. Wheeler was arrested twice in 1964, once^{for} a traffic offense, and following that for criminal trespass to a motor vehicle. The latter charge resulted in a three months' sentence to Vandalia. In 1965, he was granted probation on an auto-theft charge and in the same year was fined on two occasions for disorderly conduct, one relating to drunk and disorderly. Two additional involvements are shown in 1966 and two in 1967. In 1968, he was sentenced to a year at the Vandalia State Farm and he was convicted in 1969 of resisting arrest and disorderly conduct. The instant offense was committed in May of 1969.

We first consider the question of whether the three-year minimum is an excessive sentence. The defendant relies upon the language of the court in People v. Lillie, 79 Ill. App. 2d 174, 223 N.E.2d 716 (5th Dist. 1967), wherein the court,

in an often-quoted passage, spoke in terms of the desirability of minimum sentences that reflect the rehabilitative potential of the defendant and observed that excessive minimum sentences could very well defeat the effectiveness of the parole system by making mandatory the incarceration of a prisoner long after effective rehabilitation has been accomplished. We are in agreement with the philosophy expressed in Lillie and recognize parole and institutional authorities are in a better position and better informed with reference to a determination of a release date than the sentencing judge who must necessarily predict with reference to the prospects of rehabilitation.

We, likewise, have often expressed the view that sentences are to be individualized and the sentencing judge is to have the fullest possible information. The many decisions of this court on this subject have been based upon the decision of the United States Supreme Court in Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949) and the agreement with the philosophy there expressed by the Illinois Supreme Court in People v. Spann, 20 Ill. 2d 338, 169 N.E.2d 781, 96 A.L.R.2d 764 (1960).

In this case, the record reflects that the trial court sought full and complete information with reference to the defendant, and the sentence imposed was sought to be individualized. Considering the record of the defendant and the attendant

reports, the prior probation and the prior incarceration, the sentence can in no way be classed as excessive.

In People v. Steg, 69 Ill. App. 2d 188, 215 N.E.2d 854 (3rd Dist. 1966), the court discussed the problem that often arises when two or more defendants involved in the same offense are ultimately sentenced and the sentences are substantially unequal. The court there observed (at 192 (215 N.E.2d at 856)):

"Where there is no basis either in the records of the individuals involved or in the nature of the participation of such individuals in the crime which would justify a more severe sentence as to one of equal participants in such criminal venture, a sentence which arbitrarily imposes a greater punishment or penalty upon one or more of the individuals than another should not be approved."

This is a clear statement of disapproval of disparity of sentencing. Sentence disparity can result when like defendants with like prior records and with apparently similar prospects for rehabilitation are given substantially different penalties. Disparity can also exist where identical sentences are imposed upon defendants where the nature of the participation or the likelihood of rehabilitation or the prior criminal records are substantially different.

As we review this record, this case falls in the latter category. While in many respects the records of Wheeler, Price and Terven are depressingly similar, there are areas of difference warranting different sentences, and such different

sentencing is in accord with individualization and cannot be said to be arbitrary or disparate.

The defendant Wheeler had received probation and got into difficulty during the period of probation. He had been incarcerated but returned from incarceration to further engage in criminal activity. This demonstrated propensity, aggravated by the alcohol problem, coupled with the express hope of the trial court that the defendant would avail himself of the training and educational facilities of the correctional institution, warrants the sentence imposed. The judgment of the Circuit Court of McLean County is affirmed.

Judgment affirmed.

SMITH, P.J. and TRAPP, J., concur.

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